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Supreme Court, U.S.
1991

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

GREATER SOUTH SUBURBAN BOARD OF REALTORS, an Illinois not-for-profit corporation and NATIONAL ASSOCIATION OF REALTORS, an Illinois not-for-profit corporation,

Petitioners,

v.

CITY OF BLUE ISLAND, VILLAGE OF CALUMET PARK, CITY OF COUNTRY CLUB HILLS, VILLAGE OF GLENWOOD, VILLAGE OF HAZEL CREST, VILLAGE OF MATTESON, VILLAGE OF PARK FOREST, VILLAGE OF RICHTON PARK, VILLAGE OF UNIVERSITY PARK, and SOUTH SUBURBAN HOUSING CENTER, an Illinois not-for-profit corporation,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

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151

INDEX TO APPENDIX

	App. Page
Opinion of the Court of Appeals	1
Judgment of the Court of Appeals	60
Order of the Court of Appeals Denying Petition for Rehearing	62
Opinion of the District Court	64
Judgment of the District Court	137
Municipal Ordinances	139

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Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 89-2115, 89-2122, 89-2123, 89-2218,
89-2767, 89-2777, 89-2778 and 89-2846

SOUTH SUBURBAN HOUSING CENTER,

Plaintiff-Appellee,
Cross-Appellant,

v.

GREATER SOUTH SUBURBAN BOARD OF REALTORS
and NATIONAL ASSOCIATION OF REALTORS,

Defendants, Counterplaintiffs-
Appellants, Cross-Appellees,

v.

CITY OF BLUE ISLAND, et al.,

Counterdefendants-Appellees,
Cross-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 89 C 8149—**Harry D. Leinenweber,** *Judge.*

ARGUED FEBRUARY 15, 1990—DECIDED JUNE 19, 1991

Before WOOD, JR., COFFEY and FLAUM, *Circuit Judges.*

COFFEY, *Circuit Judge.* These consolidated appeals deal with a variety of constitutional and Fair Housing Act chal-

lenges to real estate marketing activities and municipal ordinances affecting the real estate market in a number of the southern suburbs of Chicago, Illinois. The municipalities involved are the Cities of Blue Island and Country Club Hills and the Villages of Calumet Park, Glenwood, Hazel Crest, Matteson, Park Forest, Richton Park and University Park. The court disposed of these issues following a bench trial consisting of approximately eight weeks of testimony presented intermittently between March 23, 1987, and September 1, 1987.

We affirm 1) the district court's finding that Greater South Suburban Board of Realtors and National Association of Realtors (the Realtors) did not violate the Fair Housing Act in excluding South Suburban Housing Center's (SSHC) Apache Street homes from the Multiple Listing Service or in commencing disciplinary action against SSHC's realtor, William Motluck; 2) the trial judge's determinations that the Realtors lacked standing to pursue their Equal Protection claim against SSHC and Park Forest and that the affirmative marketing plan applicable to the Apache Street homes was permissible under the Fair Housing Act; 3) the district court's determinations upholding against First Amendment challenge the municipal ordinances of Country Club Hills, Matteson, Park Forest and University Park concerning the size, placement and number of "for sale" signs; and 4) the trial court's conclusion that the municipal ordinances of the City of Country Club Hills and the Villages of Hazel Crest, Matteson, Glenwood and Park Forest limiting solicitation did not violate the Fair Housing Act. We reverse the district judge's finding that the anti-solicitation ordinances of the abovementioned municipalities violated the First Amendment and were unconstitutional because of vagueness. We also reverse the district court's conclusion that the Country Club Hills permit fee for the erection of "for sale" signs was free from constitutional infirmity. And we remand for further consideration the Realtors' claim that the Village of Glenwood's ban of "for sale" signs violated the Fair Housing Act, despite the eleventh-hour repeal of the same.

I. FACTS

The municipal defendants are located in an area bordered on the north by the City of Chicago, on the west approximately by Harlem Avenue or Interstate 57, on the south roughly by Will County and on the east by the Indiana State line. The district court found that these formerly all-white suburbs have become integrated, but now face the threat of resegregation as a result of

> "a complex mix of market forces. These market forces include racial prejudice: some whites and some blacks prefer to live in segregated communities; the belief that high concentrations of blacks result in a drop in home values; the expectation that an integrated community will eventually become segregated; and housing search practices that are reinforced by certain real estate practices."

South-Suburban Housing Center v. Greater South Suburban Board of Realtors, 713 F. Supp. 1068, 1074 (N.D. Ill. 1988). In order to stem the tide of these market forces and promote integrated housing patterns, the plaintiff, SSHC, "attempted to influence the housing market by encouraging the sales and marketing of real estate in what it terms to be 'non-traditional' ways, i.e., encouraging whites to move to black or integrated areas and blacks to move to white or integrated areas." *Id.* at 1075. A controversy between South-Suburban Housing Center and the Realtors over the propriety of SSHC making special efforts to market houses in black neighborhoods to white home buyers spawned the initial complaint in this litigation, which has resulted in the eight appeals consolidated herein.

The plaintiff, SSHC, is an Illinois, non-profit corporation whose "purposes are to 'promote and encourage multiracial communities in the South Suburbs' of Chicago and 'promote open housing to all people regardless of race.' " *Id.* at 1073. SSHC engages in a program of "affirmative marketing" of real estate, which "consists of race conscious efforts to promote integration or prevent segregation through special marketing of real estate to attract

persons of particular racial classifications who are not likely to either be aware of the availability or express an interest in the real estate without such special efforts." *Id.* at 1075.

The defendants/counterplaintiffs are two realtor trade associations, the Greater South Suburban Board of Realtors (GSSBR) and the National Association of Realtors (NAR). The GSSBR is an Illinois, non-profit corporation which is an organization of licensed real estate brokers and salesmen operating in the south suburbs of Chicago. One of GSSBR's activities is the operation of a multiple listing service (MLS) in the south suburbs. The district court described the MLS as follows:

> "[the] multiple listing service ('MLS') [is] a facility by which a MLS member broker makes a blanket unilateral offer of subagency to all other MLS participants with respect to a home listed with that broker. The MLS computer data base contains information about homes listed for sale with its members. MLS members and their home-seeking prospects can review this data via computer terminals or by reviewing printed compilations distributed to members on a bi-weekly basis."

Id. at 1077. The NAR is also an Illinois non-profit corporation and an organization of licensed real estate brokers that "provides policy guidance and materials and services of various sorts to its local affiliates, including the GSSBR." *Id.* at 1073.

The other litigants in this case are nine south suburban municipalities, the Cities of Blue Island and Country Club Hills and the Villages of Calumet Park, Glenwood, Hazel Crest, Matteson, Park Forest, Richton Park and University Park. These municipal defendants are parties to the suit as a result of ordinances they enacted either regulating real estate broker in-home solicitations or regulating the exhibition of real estate "for sale" signs. The Village of Park Forest also faces a legal challenge because of its alleged involvement with SSHC's efforts to "affirmatively market" to white individuals three homes South Suburban Housing Center purchased from Park Forest.

The facts of this case deal with the following: 1) concerns over affirmative marketing, 2) limitations on real estate broker solicitation and 3) restrictions on "for sale" signs.

A. Affirmative Marketing

This action originated as a result of the Realtors' reaction to South-Suburban Housing Center's attempts to promote a racial balance in the Village of Park Forest through making special efforts to interest white home buyers in property there. The current racial imbalance came about during the 1970s when many black families moved into an area in the northeast corner of the Village of Park Forest, Illinois known as the Eastgate subdivision. At the time of the 1980 census, the census block including the homes at issue here had become more than fifty-six percent black, more than double the black population of any other census block in the Eastgate subdivision. As a result of the area's reputation as "a black block," few white families were interested in buying property. The area became less attractive to home buyers as VA and FHA mortgage foreclosures led to abandoned homes and neighborhood blight. *See South-Suburban Housing Center*, 713 F. Supp. at 1076. In response to the problem of abandoned homes in the Eastgate subdivision, in 1982 the Village of Park Forest instituted a program of purchasing vacant or abandoned homes for rehabilitation and resale, including vacant homes at numbers 9, 15 and 26 Apache Street. SSHC submitted a proposal, which included affirmative marketing, to Park Forest for the acquisition, rehabilitation and resale of these three homes.

After the Park Forest Board of Trustees accepted the proposal and sold the homes to the South-Suburan Housing Center, the SSHC agreed to list the homes for sale with Century 21-Host Realty through one of its salesmen, William H. Motluck. The parties utilized a standard real estate contract form with the exception of provisions that Century 21-Host Realty was "to implement the affirmative marketing plan attached as appendix." In addition to securing a buyer, Century 21-Host Realty's receipt of

a commission was conditioned upon its "performance of the attached affirmative marketing plan."

The affirmative marketing plan (AMP) directed that the realtor "use its best efforts to attract minority and majority groups persons" to the particular Apache Street home, and stated that the SSHC and the Realtor "agree that white home seekers are not likely without special outreach efforts to be attracted to the Apache St. home." The AMP also provided that the Realtor would use "the following special outreach activities to attract white home seekers to the Apache Street home:

> A. Placement of advertisements in newspapers with a predominantly white circulation;
>
> B. Distribution of information to selected rental developments; and
>
> C. Distribution of information to selected employers."

The Plan also provided that "Realtor shall not take any action which prohibits, restricts, narrows or limits the housing choice of any client on the basis of race." Century 21 was further required to maintain "a list of all persons, by race, who are shown the Apache Street home . . . ."

The Realtors became involved when Century 21-Host Realty listed the Apache Street homes with GSSBR's multiple listing service. The AMP created a conflict between Century 21 salesperson William Motluck and the Realtors, as the Realtors believed it was inappropriate under the fair housing laws to affirmatively market homes to one particular race, in this instance whites, in the absence of prior discrimination. Motluck initially became aware of the problem when he received a letter from GSSBR asserting that its legal counsel was concerned with the legality of the affirmative marketing plan and furthermore that it was contrary to the voluntary affirmative marketing agreement entered into between HUD and the National Association of Realtors. Motluck upon being so advised asked for a copy of GSSBR's legal coun-

sel's opinion. Rather than forward a copy of the opinion, they sent Motluck a letter stating that the provision requiring advertising in newspapers with a predominantly white circulation "provides for racial steering and is in violation of current Federal law." The letter further opined that the data collection provisions of the AMP are "in direct violation of the Multiple Listing rules . . . [and] may constitute a combination in restraint of trade under the Sherman Anti[-]Trust Act."

On the basis of Century 21's agreement to implement the affirmative marketing plan, GSSBR's private Equal Opportunity Commission (EOC) voted to file a complaint against Motluck under Article 10 of the NAR's Code of Ethics[1] with the Professional Standards Committee of the Illinois Association of Realtors.

> "The EOC voted to file its complaint against Motluck because the Apache Street agreements called for 'special outreach . . . to whites rather than to minorities.' The EOC's position, based upon the HUD/NAR [voluntary affirmative marketing agreement], was that special outreach to white home seekers gave rise to a violation of Article 10."

South-Suburban Housing Center, 713 F. Supp. at 1078 (citations omitted). After conducting a hearing, the Professional Standards Committee determined that there was insufficient evidence to hold Motluck liable for a violation of Article 10, as, in the words of the counsel for the hearing panel, "the evidence produced at the hearing indicated that [in attempting to market the Apache Street homes, Motluck] did nothing other than he normally did in the operation of his office in processing the listing which he obtained conditioned upon the affirmative marketing plan."

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[1] Article 10 provides:

> "The Realtor shall not deny equal professional services to any person for reasons of race, creed, sex, or country of national origin. The Realtor shall not be party to any plan or agreement to discriminate against a person or persons on the basis of race, creed, sex, or country of national origin."

After the EOC decided to file its complaint against Motluck, Robert Turpin, the person responsible for the administration of GSSBR's multiple listing service, withdrew the three Apache Street homes from the MLS. (Turpin was present at the EOC meeting). Subsequently, GSSBR proposed to condition the listing of the homes in its multiple listing service upon Century 21's and SSHC's agreement to indemnify GSSBR and its member realtors from damages, costs or attorneys' fees which might be incurred as a result of any legal proceedings that might result from the AMP. The Realtors' justification for the indemnification requirement was a belief that

> "the listings could lead to 'legal liability' or 'potential exposure' of the MLS or MLS participants under legal prohibitions against steering.
>
> "The justification advanced by defendants for thus conditioning MLS access for the Apache Street listings was [William] North's [then Senior Vice-President and General Counsel of NAR] asserted belief that the listings called for actions which 'likely' were racial steering and therefore could lead to 'legal liability' or 'potential exposure' for the MLS or MLS participants."

Id. at 1078-79. The court found that "this justification was made in good faith and was not a pretense for discrimination." *Id.* at 1079.

SSHC asserts that the Realtors' removal of the Apache Street properties from the multiple listing service as well as the decision to file a complaint against Motluck because of the AMP's requirement of directing special sales efforts toward white home buyers violated Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601 *et seq.* (the Fair Housing Act) in that it discriminated "on account of race." The district court concluded as a matter of law that the Realtors neither intended to discriminate against SSHC nor did their actions have a discriminatory effect. Thus, the court found no violation of the Fair Housing Act. *Id.* at 1079-80.

B. Anti-Solicitation Ordinances

The second major area of the parties' litigation concerned the propriety of municipal ordinances prohibiting real estate brokers from soliciting real estate listings from persons who had stated their unreceptiveness to receiving solicitations. The City of Country Club Hills and the Villages of Glenwood, Hazel Crest and Matteson, Illinois have enacted ordinances regulating realtor solicitation that are similar to one another.[2] The Hazel Crest ordinance reads as follows:

> "No person shall solicit any owner or occupant of a dwelling to sell or rent, or list for sale or rental, such dwelling at any time after such owner or occupant has notified the Hazel Crest Village Clerk that he does not desire to be so solicited.
>
> "The Clerk shall publish and make available, without charge, appropriate forms which may be executed by any owner or occupant of a dwelling to provide such notice. The Clerk shall prepare a list of the names and addresses of such owners and occupants and shall publish the same as follows:
>
> A. By maintaining a copy of said list in the office of the Village of Hazel Crest Clerk and making it available for inspection;
>
> B. By furnishing a copy of said list annually to every real estate firm belonging to the local multiple-listing service;
>
> C. By furnishing a copy of said list upon request and payment of reproduction cost to any person having an interest in the sale or rental of any dwelling in the Village of Hazel Crest.
>
> "In addition, any owner or occupant of a dwelling may notify, in writing, any real estate agent that

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[2] The Village of Park Forest has also enacted an anti-solicitation ordinance, the provisions of which are addressed in footnote 7, *infra*.

such owner or occupant does not desire to be solicited. Upon such notice a real estate agent shall not solicit such owner or occupant to sell or rent, or list for sale or rental, such dwelling."[3]

The ordinances of all four municipalities define "solicit" or "solicitation" as follows:

" 'Solicit' or 'solicitation' means any communication by or on behalf of a real estate agent with the owner or occupant of a dwelling (i) which is intended to induce the sale, rental or listing for sale or rental of such dwelling; (ii) which is intended to offer or promote services in connection with the sale, rental or listing of such dwelling; and (iii) which is carried out by means of:

(a) in-person contacts at the dwelling;

(b) written material mailed or delivered directly to the dwelling, such as direct mail, leaflets or pamphlets; or

(c) telephonic contacts with owners or occupants of the dwelling.

"For purposes of this Ordinance the term 'solicit' or 'solicitation' shall not refer to communication carried out by means of print or electronic media of gen-

[3] A comparison of the anti-solicitation ordinances in the four south suburban municipalities of Country Club Hills, Glenwood, Hazel Crest and Matteson reveals that the Hazel Crest ordinance and the Matteson ordinance are virtually identical. The Country Club Hills ordinance is the same as the other ordinances except that it provides that the Clerk shall compile lists both alphabetically and by street address and that additions and deletions from the list sent annually to real estate agents shall be posted quarterly in the Country Club Hills City Hall. The Glenwood Ordinance is also similar to the other ordinances with the exception that it provides that additions and deletions from the no-solicitation list are mailed or delivered to real estate agents quarterly.

eral circulation, such as a newspaper, radio, television or the yellow pages."[4]

The ordinances of the four municipalities considered in this section closely resemble the State of Illinois' restrictions upon real estate brokers' solicitation of unwilling persons that are contained in Ill. Rev. Stat. ch. 38 § 70-51(d), whose constitutionality we sustained in *Curtis v. Thompson*, 840 F.2d 1291 (7th Cir. 1988).[5] One difference be-

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[4] Matteson, Country Club Hills, Glenwood and Hazel Crest each adopted this definition as an amendment to their no-solicitation ordinances in 1986 or in 1987. The former, less specific definition of solicitation gave rise to legal challenges based upon vagueness. In *Penny Saver Publications, Inc. v. Village of Hazel Crest*, 905 F.2d 150, 155 (7th Cir. 1990), we concluded that the former definition of solicitation contained in the Hazel Crest ordinance, that provided that solicitation was "any conduct by a real estate agent or any employee or agent thereof intended to induce the owner of a dwelling within the village to sell, rent or list the same for sale or rental," was unconstitutionally vague. We based this conclusion on the ordinance's "fail[ure] to clearly define whether the Penny Saver's real estate advertisements came within the realm of the definition [of solicitation]." *Id.* We made clear in *Penny Saver* that we were not construing the validity of the amended ordinance, noting that: "The amended Ordinance is presently under review by this Court in *South Suburban Housing Center v. Greater South Suburban Board of Realtors*, 713 F. Supp. 1068 (N.D. Ill. 1988), *appeal docketed*, Nos. 89-2115, 89-2112, 89-2123, and 89-2218 (7th Cir. argued Feb. 15, 1990), and we do not touch on its constitutionality in this decision." *Id.* at 153.

[5] The text of that statute reads as follows:

"It shall be unlawful for any person or corporation knowingly:

* * *

"(d) To solicit any owner of residential property to sell or list such residential property at any time after such person or corporation has noticed that such owner does not desire to sell such residential property. For the purpose of this subsection, notice must be provided as follows:

"(1) The notice may be given by the owner personally or by a third party in the owner's name, either in the form of an individual notice or a list, provided it complies with this subsection.

(Footnote continued on following page)

tween the ordinances of the four municipalities and the state statute is that the municipal ordinances call for the city or village not only to compile but also to publish the non-solicitation list. The other differences are that the municipal ordinances are more limited in that they specifically define "solicit or solicitation," restrict their application to types of contacts that occur in the home or a residence and provide for fines only.

The trial court found that the municipalities had two bases for their anti-solicitation ordinances. First, the ordinances are

> "based on the desire to protect residents from exposure to advertising because this information might cause homeowners to question the racial stability of their communities or re-evaluate their decisions to live there. As with 'for sale' sign bans, the ordinances are designed to keep residents from moving, to maintain the status quo and to reduce the ability of homeseekers to find homes in the municipalities."[6]

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[5] *continued*

> "(2) Such notice shall be explicit as to whether each owner on the notice seeks to avoid both solicitation for listing and sale, or only for listing, or only for sale, as well as the period of time for which any avoidance is desired. The notice shall be dated and either of the following shall apply: (A) each owner shall have signed the notice or (B) the person or entity preparing the notice shall provide an accompanying affidavit to the effect that all the names on the notice are, in fact, genuine as to the identity of the persons listed and that such persons have requested not to be solicited as indicated.
>
> "(3) The individual notice, or notice in the form of a list with the accompanying affidavit, shall be served personally or by certified or registered mail, return receipt requested."

[6] *South-Suburban Housing Center*, 713 F. Supp. at 1093. The trial court went on to find that: "Wide spread solicitation by real estate brokers and salesmen, similar to the 'for sale' sign proliferation, is widely perceived to be destabilizing to an integrated community. The anti-solicitation ordinances are designed to make solicitation more difficult and expensive." *Id.* at 1094 (citation omitted).

The second "purpose of the anti-solicitation ordinances is to provide a method for a resident to obtain a measure of privacy by avoiding annoying and intrusive inquiries about residential plans." *South-Suburban Housing Center*, 713 F. Supp. at 1094. Although the Realtors urge that the "no solicitation" ordinances violated the Fair Housing Act in that they had a discriminatory impact upon black individuals, the trial court stated that "the record is devoid of substantial evidence tending to show that the ordinances were intended to discriminate against blacks or any other racial group," or that the "ordinances have had a racially discriminating effect." *Id.* at 1094.

Shortly before trial each of the four municipalities involved sent almost identical letters to real estate brokers which stated that:

> "[T]he terms 'solicit' or 'solicitation' in the ordinance include any business or promotional communication by a real estate agent to a homeowner in his or her home which is not carried out by media of general circulation, and the Village will treat such a communication to a resident on the list as a violation of the Ordinance."[7]

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[7] Park Forest also has an ordinance providing for the village clerk to maintain and publish a list of those persons who did not desire solicitations. The major difference between the Park Forest ordinance and the remaining four ordinances is in its definition of "solicitation" which reads:

> "*Solicitation* means any conduct (excluding advertisement in newspapers, magazines or broadcast media of general circulation) designed or intended to induce the owner of any real property (as herein above defined) to sell, rent, exchange, convey, transfer or list for sale or rental such real property."

Although not identical to the definitions in the remaining ordinances, the district court observed that this definition was "substantially similar" to the definition contained in the amended ordinances of the other municipalities. Park Forest's status before us also differs from the other four municipalities in that it did not send a letter to realtors broadly defining the term "solicitation" to include even

(Footnote continued on following page)

The trial court held that this definition including every business communication "not carried out by media of general circulation" "despite the oridinances' requirement that a communication must be *intended to induce a sale or listing for sale*," rendered the ordinances constitutionally invalid: "The text of the ordinances provide insufficient warning that 'indirect' solicitation is prohibited and thus they are unconstitutionally vague." *Id.* at 1096 (emphasis original).

C. Real Estate For Sale Signs

Four municipalities in the south suburbs have enacted limitations on the display of real estate "for sale" signs. The City of Country Club Hills and the Villages of Matteson and Park Forest regulate the size of these signs. These three municipalities as well as the Village of University Park have enacted regulations on the number of "for sale" signs that may be displayed on a piece of real estate as well as the placement of the signs.

Each of the municipalities that regulate the size, number and placement of "for sale" signs states in the preamble or in the text of the ordinance that its purpose is to advance the aesthetics of the community. The district court made a factual finding that there was "little evidence that the sign regulations resulted in measurable lost income for realtors, that the regulations had a discriminatory impact on black home seekers, or that they denied access to housing to anyone." *South-Suburban Housing Center*, 713 F. Supp. at 1090-91. Thus, the court held that

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[7] *continued*
indirect soliciting through media of general circulation. The district court nonetheless found as a fact that each of the municipalities (apparently including Park Forest), "interpret their ordinances to ban all business communication mailed or delivered by real estate brokers, even if their intended purpose was only to generate good will, such as holiday calendars, birthday greetings, the sales of investment or vacation property, or to find buyers or referrals." *South-Suburban Housing Center*, 713 F. Supp. at 1094.

the ordinances do not violate the Fair Housing Act. The trial judge further rejected the Realtors' constitutional challenge to the ordinances on the basis that "they are justified without reference to the content of the regulated speech, they are narrowly tailored to serve a significant governmental interest and they leave open ample alternative channels for communication of the information." *Id.* at 1093.

Country Club Hills is the only one of these municipalities that further requires that persons displaying a "for sale" sign obtain a city permit costing $60.00 for a six month period. The Realtors' claim is that this fee exceeds the costs of administering the City's regulations. Although neither the parties nor the district court cite to any specific dollar figures which are attributable to the administration and enforcement of the "for sale" sign permit program, the district court found that "[t]here was no evidence that the fees charged exceeded the administration costs." *Id.* at 1103.

In contrast to the other municipalities regulating real estate "for sale" signs, Glenwood, Illinois enacted an ordinance enforcing a ban on these signs in 1972. Prior to 1982 Glenwood ceased enforcing its sign ban as a result of the Supreme Court's decision in *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977), which sharply curtailed a municipality's ability to enforce a ban on "for sale" signs. In spite of the advice of Glenwood's village attorney that enforcement of a sign ban would be unconstitutional, Glenwood again decided to enforce its ordinance prohibiting "for sale" signs on March 1, 1984. On the advice of its counsel, Glenwood repealed its "for sale" sign ban just prior to trial. Even though the issue of Glenwood's enforcement of its ban on "for sale" signs was raised in the pleadings and was the subject of evidence introduced at trial, the district court failed to make specific findings of fact or conclusions of law regarding the issue. But, we hasten to point out that the Realtors failed to call this issue to the court's attention at trial much less challenge the lack of specific findings and conclusions of law in their post-trial motions in the district court.

II. THE REALTORS' CHALLENGE TO THE APACHE STREET AFFIRMATIVE MARKETING PLAN

The Realtors contend that SSHC and Park Forest violated the Fair Housing Act, 42 U.S.C. § 3601, *et seq.*, and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution in initiating the affirmative marketing plan for the three Apache Street homes. The trial court held that the Realtors lacked standing to pursue the equal protection claim because the "equal protection claim . . . rest[s] on legal rights of minority home buyers rather than those of homesellers." *South-Suburban Housing Center*, 713 F. Supp. at 1089-90. The court reached the merits of the Realtors' Fair Housing Act challenge and held that neither SSHC nor Park Forest violated the Act during the marketing of the Apache Street homes.[8]

A. The Realtors' Standing

Park Forest contends that the court erred in concluding that the Realtors possessed standing to bring their Fair Housing Act claim, while the Realtors urge that the trial court erred in holding that they lacked standing to pursue their equal protection claim.

In *Penny Saver Publications, Inc. v. Village of Hazel Crest*, 905 F.2d 150, 154 (7th Cir. 1990), we observed that:

> "The first element of the standing inquiry that [a plaintiff] 'must satisfy in this Court is the "case" or "controversy" requirement of Art. III of the United States Constitution.' *Secretary of State of Maryland v. J.H. Munson Co.*, 467 U.S. 947, 955 (1983). The relevant inquiry for a case or controversy is to determine whether a plaintiff has shown an injury to himself that is likely to be redressed by a favorable

[8] Before the trial court, the Realtors also urged that Park Forest and SSHC violated 42 U.S.C. § 1982. The Realtors abandoned this claim on appeal.

> decision. *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976)."

Indeed, other than the requirement that the purported injury must be "likely to be redressed by a favorable decision,"[9] injury in fact is the only requirement to achieve standing under the Fair Housing Act, for the United States Supreme Court has held that:

> " 'Congress intended standing under § 812 [of the Fair Housing Act] to extend to the full limits of Art. III' and . . . the courts accordingly lack the authority to create prudential barriers to standing in suits brought under that section. [*Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 103, n.9 (1979)]. Thus, the sole requirement for standing to sue under § 812 is the Art. III minima of injury in fact: that the plaintiff alleged that as a result of the defendant's actions he has suffered 'a distinct and palpable injury,' *Warth v. Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343 (1975)."

Havens Realty Corp. v. Coleman, 455 U.S. 363, 372, 102 S. Ct. 1114, 1121 (1982).

The Realtors assert that they suffered an injury in fact based upon their role as the representative of the individual interests of their member realtors. As this case demonstrates, the Realtors have interpreted the AMP as applied to the Apache Street homes to be in violation of the fair housing obligations and the Realtors' code of ethics. Thus, the threat of professional discipline inhibits member realtors from handling the listings involved. We are convinced that as organizations responsible for advancing both the professional ethics and the economic well being of the individual realtors, the Realtors have suffered an injury

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[9] Park Forest has not challenged the redressability of the Realtors' alleged injury. Furthermore, if the Realtors were to receive a favorable decision from this court, the injuries of which they complain would be removed.

in fact as a result of the damage occurring to member realtors from their inability to handle the Apache Street listings. Thus, under *Havens*, the Realtors' assertion of a redressible "injury in fact" is sufficient to provide them with standing to pursue their Fair Housing Act claim. *Accord Gorski v. Troy*, No. 89-3675, slip op. at 10-11 (7th Cir. April 11, 1991) ("Congress intended standing under the FHA 'to extend to the full limits of Art. III . . . .' " (Quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. at 103 n.9)).

In addition to demonstrating "injury in fact," the Realtors must also satisfy prudential standing concerns in order to pursue their claim based upon the equal protection rights of potential black home buyers.

> "When a person or entity seeks standing to advance the constitutional rights of others, we ask two questions: first, has the litigant suffered some injury in fact, adequate to satisfy Article III's case-or-controversy requirement; and second, do prudential considerations which we have identified in our prior cases point to permitting the litigant to advance the claim?"

Caplin & Drysdale, Chartered v. United States, 109 S. Ct. 2646, 2651 n.3 (1989).

The trial judge concluded that the Realtors lacked standing to litigate the equal protection claims because "[a]n equal protection claim would clearly rest on legal rights of minority home buyers rather than those of home sellers." *South-Suburban Housing Center*, 713 F. Supp. at 1089-90. Upon our examination of the Realtors' equal protection contentions, we are convinced that the rights asserted in the complaint can only be classified as those of minority home buyers rather than those of the Realtors themselves in that the claim is phrased in language which states that the affirmative marketing plan violates the equal protection rights of potential minority home buyers. Thus, the Realtors are without standing to pursue this alleged injury to minority home buyers unless the Realtors fall somehow within an exception to the prudential rule against third-party standing.

The Supreme Court has recognized that the prudential rule against standing to assert the constitutional rights of third persons, "[l]ike any general rule . . . should not be applied where its underlying justifications are absent." *Singleton v. Wulff*, 428 U.S. 106, 114, 96 S. Ct. 2868, 2874 (1976) (plurality opinion). In determining third-party standing courts are to consider "the relationship of the litigant to the person whose rights are being asserted; the ability of the person to advance his own rights; and the impact of the litigation on third-party interests." *Caplin & Drysdale, Chartered*, 109 S. Ct. at 2651 n.3.

In examining the relationship between the Realtor litigants and the potential black home buyers whose rights they seek to vindicate, we must examine "whether the enjoyment of the [potential home buyer's] right is inextricably bound up with the activity the litigant wishes to pursue." *Singleton*, 428 U.S. at 114, 96 S. Ct. at 2874 (plurality opinion). Unlike *Caplin & Drysdale*, where the attorney's right to a fee was bound up with a specific client's claim that forfeiture of his assets interfered with his Sixth Amendment right to counsel, or *Singleton*, where the physician's interest in payment for his abortion services was closely associated with the patient's alleged right to government payment for an abortion, the Realtors have failed to demonstrate a true relationship between their interest in pursuing particular real estate marketing practices and the constitutional rights of specific potential black home buyers. *Cf. Rothner v. City of Chicago*, No. 89-3614, slip op. at 7-8 (7th Cir. April 1, 1991) (permitting distributor and operator of video games to pursue alleged First Amendment challenge of ordinance prohibiting minors from playing video games between 8:00 a.m. and 3:00 p.m. on days when the city's schools are in session). Indeed the record clearly establishes that the Realtors have been unable to point to a single minority home buyer who was deprived of his or her equal protection rights as a result of the Apache Street affirmative marketing plan. *See South-Suburban Housing Center*, 713 F. Supp. at 1088 ("[Realtors] offered no evidence respecting any persons who sought

to purchase or rent homes and who were denied that right by the SSHC, or that the SSHC denied or made housing available to anyone, or in any way restricted or limited anyone's housing choice . . . .").

The relationship between the Realtors and black home buyers does not reflect the similarity in interest which would lead to the conclusion that "the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the [constitutional] right as the latter." *Singleton*, 428 U.S. at 115, 96 S. Ct. at 2874 (plurality opinion). Although the Realtors have a strong philosophical commitment to a housing market in which equal opportunity is realized solely through "color blind" marketing, since no potential black home buyers are involved in this suit, it is unclear as to whether their priorities are similar. One of the prudential reasons for the rule against third party standing is that "the courts should not adjudicate [constitutional] rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not." *Singleton*, 428 U.S. at 113-14, 96 S. Ct. at 2874 (plurality opinion). We refuse to address the constitutional issue of an equal protection violation until such time as it is presented by a potential home buyer, as we, like the Supreme Court, believe that "third parties themselves usually will be the best proponents of their own rights." *Singleton*, 428 U.S. at 114, 96 S. Ct. at 2874 (plurality opinion).

The second potential exception to the rule against third party standing turns upon the "ability of the [third party] to advance his own rights,"[10] and whether "there is some genuine obstacle to [the personal] assertion"[11] of the constitutional right. We are unable to discern anything in the record that would prevent black home buyers from filing a constitutional challenge to an affirmative market-

[10] *Caplin & Drysdale*, 109 S. Ct. at 2651 n.3.

[11] *Singleton*, 428 U.S. at 116, 96 S. Ct. at 2875 (plurality opinion).

ing program directed toward white home buyers. Thus, the exception relating to third parties who are unable to effectively assert their own rights fails to aid the Realtors in their quest for standing to assert their equal protection claim.

The final factor considered in determining whether an exception to the rule against third party standing is warranted is "the impact of the litigation on third-party interests." *Caplin & Drysdale*, 109 S. Ct. at 2651 n.3. Based on the record before us, we are not in a position to determine whether potential black home buyers would desire the Apache Street AMP to be invalidated, thereby decreasing competition from white home buyers for these properties; nor are we able to ascertain whether they would want the affirmative marketing plan upheld in order to promote developing and maintaining an integrated community in Park Forest. Hence, we are unconvinced that allowing the Realtors to assert the equal protection claim would, in fact, further the interests of potential black home buyers.

We conclude that while the Realtors have fulfilled the injury in fact requirement for bringing their Fair Housing Act challenge to the Apache Street affirmative marketing program, they have failed to overcome the prudential limitations on standing that preclude them from asserting the equal protection-based constitutional claims of black home buyers.

B. Mootness

Both Park Forest and SSHC urge that the 1985 sale of the three Apache Street homes has rendered moot the Realtors' Fair Housing Act challenge to the Apache Street affirmative marketing plan.[12] The Realtors' Fair Housing

[12] Although the homes were sold prior to trial, Park Forest and SSHC for some reason did not raise their mootness challenge in the district court. Because a moot action does not satisfy the case or controversy requirement of Article III of the Constitution, *see*

(Footnote continued on following page)

Act challenge to the Apache Street Plan requests damages and declaratory relief in addition to injunctive relief. In *Penny Saver*, we held that although a subsequent development (amendment of a challenged ordinance) had rendered a request for injunctive relief moot:

> "This is not to say that Penny Saver's entire action is moot. Rather, Penny Saver still has a viable claim for declaratory and monetary relief. The fact that the Ordinance has been amended subsequent to the commencement of this case 'does not moot plaintiff's claim for either declaratory or monetary relief.' *Black v. Brown*, 513 F.2d 652 (7th Cir. 1975) (new regulations adopted by prison officials do not moot declaratory or monetary claim on the original regulations). As the Supreme Court concluded in *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 713 (1989), the expiration of an ordinance does not render the controversy moot because there still remains a live controversy between the parties as to whether the ordinance was unlawful thus entitling the plaintiff to damages. The Court has also previously stated 'that voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot.' *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953). *See also Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1, 8-9 (1978) (respondent's claim for actual and punitive damages arising from termination of service saves this cause from the bar of mootness); *Powell v. McCormack*, 395 U.S. 486, 499 (1969) ('A court may grant declaratory relief even though it chooses not to issue an injunction' because that claim is moot.)"

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[12] *continued*
Air Line Pilots Association, Int'l v. UAL Corp., 897 F.2d 1394, 1396-97 (7th Cir. 1990), the mootness claim is a "nonwaivable question of subject matter jurisdiction . . . ." *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1525 (7th Cir. 1990) (Article III-based standing issue). Thus, mootness may properly be asserted on appeal.

905 F.2d at 153. Hence, the Village's amendment of its ordinance after the suit had been filed failed to invalidate Penny Saver's claims. Likewise, the sale of the three Apache Street homes after the initiation of this case fails to moot the Realtors' claims for damages. Thus, the Realtors' action is not moot, and a case or controversy exists over which we may properly exercise subject matter jurisdiction.

C. The Realtors' Fair Housing Act Claims

The Realtors allege that SSHC and Park Forest violated sections 804(a) and 804(c) of the Fair Housing Act, 42 U.S.C. § 3604(a) and (c), in promulgating and implementing the Apache Street affirmative marketing plan. These sections provide as follows:

> "As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful—
>
> "(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin.
>
> * * *
>
> "(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, or national origin, or an intention to make any such preference, limitation, or discrimination."

The trial court determined that SSHC and Park Forest did not violate the Fair Housing Act in their implementation of the Apache Street Plan. *See South-Suburban Housing Center*, 713 F. Supp. at 1087-88.

1. 42 U.S.C. § 3604(a)

We turn to the Realtors' claim that SSHC and Park Forest violated 42 U.S.C. § 3604(a), which prohibits the "refus[al] to sell or rent . . . or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin." The Fair Housing Act is concerned with both the furtherance of equal housing opportunity and the elimination of segregated housing. As we observed in *Southend Neighborhood Improvement Association v. County of St. Clair*, 743 F.2d 1207, 1209-10 (7th Cir. 1984):

> "The Fair Housing Act prohibits both direct discrimination and practices with significant discriminatory effects. For example, although Section 3604(a) applies principally to the sale or rental of dwellings, courts have construed the phrase 'otherwise make unavailable or deny' in subsection (a) to encompass mortgage 'redlining,' insurance redlining, racial steering, exclusionary zoning decisions, and other actions by individuals or governmental units which directly affect the availability of housing to minorities. Of course, *the alleged illegal actions must lead to discriminatory effects on the availability of housing. The Act is concerned with ending racially segregated housing. Section 3604(a) applies to the availability of housing.* That section thus is violated by discriminatory actions, or certain actions with discriminatory effects, that affect the availability of housing."

(Emphasis added) (footnote and citations omitted). The Realtors argue that the affirmative marketing plan furthers the goal of "ending racially segregated housing" at the expense of limiting the "availability of housing" for black people. They assert that this alleged subordination of equal housing opportunity to the goal of integration is invalid, just as the courts held in *United States v. Starrett City Associates*, 840 F.2d 1096 (2d Cir.), *cert. denied*, 488 U.S. 946 (1988), and *United States v. Charlottesville Redevelopment and Housing Authority*, 718 F. Supp. 461 (W.D. Va. 1989). In *Starrett City*, owners of a government

subsidized housing development sought to maintain an ethnic distribution of tenants in their project consisting of sixty-four percent white persons, twenty-two percent black persons and eight percent hispanic persons through a "tenanting procedure" that filled apartment vacancies with "applicants of a race or national origin similar to that of the departing tenant . . . ." 840 F.2d at 1098. In *Charlottesville*, a "tenant selection policy . . . gave preferential treatment to white applicants for public housing," based upon an intent to "achieve a 50/50 mix of black and white residents in . . . public housing." 718 F. Supp. at 462. The courts determined that each of these "quota" programs violated the Fair Housing Act. In *Charlottesville*, the court recognized that the Fair Housing Act's twin purposes of eliminating discrimination in housing and furthering integration in housing are both important, but may occasionally be incompatible:

> "The legislative history of the Fair Housing Act suggests to this court that the prime focus or the 'quickening' force behind that legislation is prohibition of discrimination in the provision of housing, but also that integration was seen by the creators of that legislation as a prominent goal and a value of great worth. From the perspective of over two decades, it is perhaps excusable to find the unexamined assumption in the Act's legislative history that the principles of nondiscrimination and integration will always necessarily go hand in hand. With our later perspective, that assumption may be unfounded, but it does not detract from the observation that this legislation was created with both legal (and moral) principles in mind, although primary weight is given to the prohibition of discrimination. However, cases such as *Trafficante* [*v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972)] illustrate that the legal principle of integration and concern for the achievement of that goal cannot be considered mere surplusage."

718 F. Supp. at 467. The court determined that Charlottesville's "quota" program presented a conflict between the

Act's purposes of nondiscrimination and integration, and held that:

> "In the present conflict between these two legal principles, nondiscrimination and integration, the obligation of [the Charlottesville Redevelopment and Housing Authority (CRHA)] to avoid discrimination must 'trump' CRHA's obligation to promote integration, as regards the promotion of integration through the specific policy mechanism and controversy before this court. It is not that this court ascribes to integration a status inferior to nondiscrimination in the pantheon of legal values. It is, rather, that the duty to avoid discrimination must circumscribe the specific particular ways in which a party under the duty to integrate can seek to fulfill that second duty."

718 F. Supp. at 468. Similarly, the Second Circuit in *Starrett City* held that while integration maintenance with its concern over

> "the 'white flight' phenomenon may be a factor 'take[n] into account in the integration equation,' *Parent Ass'n of Andrew Jackson High School v. Ambach*, 598 F.2d 705, 720 (2d Cir. 1979), it cannot serve to justify attempts to maintain integration at Starrett City through inflexible racial quotas that are neither temporary in nature nor used to remedy past racial discrimination or imbalance within the complex."

Starrett City, 840 F.2d at 1102. Thus, *Starrett City* and *Charlottesville* both mandate the conclusion that an interest in racial integration alone is insufficient to justify a racial quota system which favors whites and thereby lessens housing opportunities for minorities.

In contrast to the subordination of the goal of equal housing opportunity to the goal of integration presented by the facts in *Starrett City* and *Charlottesville*, the Realtors' challenge to the Apache Street affirmative marketing plan presents the question of whether a real estate organization may engage in limited race conscious marketing which does not exclude minorities from housing opportu-

nities. Thus, we are not dealing with conflicting goals, for the affirmative marketing plan furthers the goal of integration while providing equal opportunities to all.

Essentially, the Realtors' contention is that the AMP constitutes invalid "steering" of blacks from Park Forest in that it "deterred blacks from buying on Apache Street and in Park Forest generally by directing essential information about housing availability away from blacks and towards whites, and by stigmatizing black residents and home seekers." This Court has not previously addressed the question of whether an attempt to interest white homeowners in property located in an area of predominant interest to black home buyers constitutes "steering" violative of the Fair Housing Act. However, we recently addressed the analysis applicable to an allegation of more traditional, non-benign "steering" in *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1529-30 (7th Cir. 1990):

> "The mental element required in a steering case is the same as that required in employment discrimination cases challenged either under Title VII of the Civil Rights Act of 1964 (and section 3604 is part of the same Act) or under 42 U.S.C. § 1981 (the standard of liability in which is similar to that in Title VII, *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1420 (7th Cir. 1986)) on a theory of disparate treatment. 'Disparate treatment' means treating a person differently because of his race; it implies consciousness of race, and a purpose to use race as a decision-making tool. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15, 97 S.Ct. 1843, 1854-55 n.15, 52 L.Ed.2d 396 (1977). 'Proof of discriminatory motive is critical' in a Title VII disparate treatment case, 'although it can in some situations be inferred from the mere fact of differences in treatment.' *Id.*"

In analyzing the question of whether directing information to predominantly white audiences concerning the Apache Street homes violates the Fair Housing Act, we must rec-

ognize that these homes likely would have been primarily of interest to black home buyers. But SSHC's affirmative marketing plan in no way deters black home buyers from pursuing their interest in the Apache Street homes; it merely creates additional competition in the housing market. If the AMP resulted in realtors "refusing to show properties because of the race of the *customer*, or misleading the *customer* about the availability of properties because of his race, or cajoling or coercing the *customer* because of his race to buy this property or that or look in this community rather than that," *id.* at 1530, we would agree that racial steering may possibly have been involved. In the absence of concrete evidence of this nature, however, we see nothing wrong with SSHC attempting to attract white persons to housing opportunities they might not ordinarily know about and thus choose to pursue.

The district court explicitly found that:

> "The SSHC's stated purpose in entering into and implementing the Apache Street listings was to add some 'white traffic to the properties in addition to the black traffic,' not to decrease or restrict the black traffic. The relevant evidence supports a finding that that was in fact the SSHC's purpose."

South-Suburban Housing Center, 713 F. Supp. at 1085. With respect to the ultimate factual finding of whether the Realtors had proven intentional discrimination, the trial court found:

> "Since counterplaintiffs offered no evidence respecting any persons who sought to purchase or rent homes and who were denied that right by the SSHC, or that the SSHC denied or made housing available to anyone, or in any way restricted or limited anyone's housing choice, the court concludes that the counterplaintiffs have failed to prove an 'intent' case under the Fair Housing Act."

Id. at 1088. The record contains neither cases of particular adversely affected black home buyers nor statistical evi-

dence that would lead us to conclude that the trial court's finding of an absence of intentional discrimination was clearly erroneous.

In addition to furthering the Fair Housing Act's goal of integration, we are of the opinion that the AMP also advances the purpose of the Act through making housing equally available to all by stimulating interest among a broader range of buyers. Furthermore, this marketing may simply be a wise business move in that it stimulates interest in housing among new and/or potential customers. We disagree with the Realtors' argument that increased competition among black and white home buyers for the same homes constitutes a violation of the Fair Housing Act. Instead, this is precisely the type of robust multiracial market activity which the Fair Housing Act intends to stimulate. Because the Apache Street affirmative marketing plan merely provided additional information to white home buyers concerning properties they might not ordinarily know about nor consider, and involved no lessening of efforts to attract black home buyers to these same properties, we conclude that the plan was not in violation of 42 U.S.C. § 3604(a).[13]

2. 42 U.S.C. § 3604(c)

The Realtors go on to argue that SSHC and Park Forest violated 42 U.S.C. § 3604(c) because the promulgation of the Apache Street AMP constituted the publication of a statement indicating a preference based on race or color or an intention to make such a preference. As discussed

[13] We would also note that there was some evidence in the record that, as a result of the problems arising from the litigation involving the AMP, William Motluck of Century 21-Host Realty was unable to carry out the provisions of the affirmative marketing plan and, thus, did nothing other than what he would have ordinarily done in marketing the Apache Street homes. Obviously, if this is true, there is no basis to conclude that the implementation of the Apache Street AMP violated 42 U.S.C. § 3604(a).

previously, the Apache Street AMP merely directs additional promotional and advertising toward a racial group that would normally have little interest in the respective homes. It contains no racial quota or other provision purporting to make race a factor in a decision concerning who would be permitted to see or purchase the Apache Street homes. Thus, we are of the opinion that the Apache Street plan was not an improper statement of racial preference under 42 U.S.C. § 3604(c).

III. SSHC's CHALLENGE TO THE REALTORS' CONDUCT RESPONDING TO THE APACHE STREET AFFIRMATIVE MARKETING PLAN

SSHC appeals from the trial court's conclusions of law that 1) the Realtors did not violate 42 U.S.C. § 3606 when they initially excluded the Apache Street homes from the GSSBR multiple listing service and later required indemnification as a pre-condition to the inclusion of the listings, and 2) that the Realtors did not transgress 42 U.S.C. § 3617 as a result of the above behavior together with the disciplinary proceedings commenced against William Motluck, the real estate broker who attempted to sell the Apache Street homes.[14]

A. 42 U.S.C. § 3606

Section 806 of the Fair Housing Act, 42 U.S.C. § 3606, provides that:

> "After December 31, 1968, it shall be unlawful to deny any person access to or membership or participation in any multiple-listing service, real estate brokers' organization or other service, organization, or

[14] In the trial court, SSHC also challenged the Realtors' practices under 42 U.S.C. § 3604(a) and under state tort law theories. Because SSHC did not raise these claims on appeal, we deem them to be abandoned.

> facility relating to the business of selling or renting dwellings, or to discriminate against him in the terms or conditions of such access, membership, or participation, on account of race, color, religion, sex, or national origin."

SSHC contends that the Realtors (GSSBR and NAR) denied or conditioned access to GSSBR's multiple listing service "on account of race" because their conduct was based upon the fact that SSHC's affirmative marketing plan pertaining to the Apache Street homes constituted a special outreach to white home buyers. The trial court rejected SSHC's argument, finding that the Realtors' initial exclusion of the Apache Street homes from the MLS and the later requirement for indemnification as a condition for listing the homes were made in good faith based upon concerns that the Apache Street AMP constituted racial steering which was illegal and could result in potential liability for the multiple listing service or the MLS participants. *See South-Suburban Housing Center*, 713 F. Supp. at 1078-79. SSHC contends that these justifications are discriminatory by their very nature.

The question presented is whether the Realtors acted "on account of race," when they restricted access to the multiple listing service. Because SSHC has argued this case on a "disparate treatment," or "intentional discrimination," theory, our task is to determine whether the trial court's finding that the exclusion of the SSHC's properties was not made "on account of race" is free from clear error. *Cf. Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985) (holding that question of intentional discrimination under Title VII of the Civil Rights Act is a factual question subject to the "clearly erroneous" standard of review). In reviewing the question of whether the Realtors restricted access to GSSBR's multiple listing service "on account of race," we are without legal precedent to guide us, for no case law has been cited for us nor to our knowledge is there any. Thus, this is a case of first impression construing this section of the Fair Housing Act.

SSHC essentially claims that the Realtors excluded them from the multiple listing service because they sought to market their properties to white persons. We have previously determined that the Fair Housing Act permits SSHC to implement an affirmative marketing plan directed toward interested white persons concerning properties they would not ordinarily consider. But, the mere fact that the Fair Housing Act may permit SSHC to affirmatively market its properties to potential white customers falls short of *requiring* that a realtor adopt this sales practice rather than a color-blind marketing scheme. As we held in *Village of Bellwood*, a broker who engages in color-blind marketing and

> "responds to the customer's desires, is not discriminating against the *customer*, or denying the *customer* a dwelling, or misrepresenting to the *customer* the unavailability of a dwelling. The statute . . . does not impose liability for failing to promote integration, or for failing to coordinate individual integrative acts that have an aggregate resegregative effect. If the broker treats all his customers the same, regardless of race, he is not liable."

Village of Bellwood, 895 F.2d at 1531. We cannot understand how a color-blind marketing policy could possibly constitute discrimination "on account of race," nor can we fathom how the facts set forth in this record could be construed as establishing discrimination. Quite simply, the Fair Housing Act permits an AMP but does not require the Realtors or any other party to promulgate an affirmative marketing plan or to cooperate in another entity's implementation of such a plan. Thus, we are convinced that the Realtors did not violate 42 U.S.C. § 3606 when they excluded the listings of the Apache Street homes from the MLS and later conditioned participation in the MLS on indemnification against potential legal action.

B. 42 U.S.C. § 3617

SSHC goes on to argue that the exclusion of its listings from GSSBR's multiple listing service, together with the Realtors' initiation of disciplinary proceedings against Motluck, interfered with SSHC's attempts to inform white persons of housing opportunities in violation of 42 U.S.C. § 3617. 42 U.S.C. § 3617 provides:

> "It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605, or 3606 of this title. This section may be enforced by appropriate civil action."

SSHC argues that section 3617 provides for a cause of action for interfering with the enjoyment of fair housing rights that is independent of violations of the enumerated sections, but as the trial court held, the "section does not under the circumstances of this case provide an independent ground for liability." *South-Suburban Housing Center*, 713 F. Supp. at 1080. In *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1288 n.5 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978), we declined to decide whether "a violation of section 3617 can be established without first establishing a violation of sections 3603, 3604, 3605, or 3606," but we held

> "that under the circumstances of this case, where the conduct that allegedly violated section 3617 is the same conduct that allegedly violated section 3604(a) and was engaged in by the same party, the validity of the section 3617 claim depends upon whether the [conduct] violated section 3604(a)."

Id. The same reasoning is apropos here, since the conduct SSHC alleges violated section 3617 is the same conduct that we refused to hold violative of section 3606 above.

Thus, we agree with the trial court's finding that SSHC has failed to demonstrate interference with the aiding or encouraging of other persons in the exercise of rights under the Fair Housing Act. As previously discussed, the Fair Housing Act guarantees to all regardless of race, color or creed the right to equal treatment, not to preferential treatment. The Realtors never interfered with much less opposed white persons learning about, seeing or purchasing the Apache Street homes on an equal basis with black persons. They simply disagreed with the special outreach efforts to white persons that SSHC included in its AMP. Because the Realtors' conduct in limiting access to GSSBR's multiple listing service and in attempting to enforce their disciplinary rules against William Motluck do not limit SSHC's ability to "aid[ ] or encourgage" white persons in their right to enjoy equal treatment in the housing market, the Realtors have complied with the mandates of 42 U.S.C. § 3617.

IV. THE REALTORS' CHALLENGE TO THE MUNICIPALITIES' RESTRICTIONS ON SOLICITATION

The trial court concluded that the non-solicitation ordinances of the City of Country Club Hills and the Villages of Glenwood, Hazel Crest, Matteson and Park Forest violated the First Amendment to the United States Constitution insofar as they could be construed to "prohibit the mailing of mere promotional material from Realtors." *South-Suburban Housing Center*, 713 F. Supp. at 1095. The district court further determined that the ordinances were unconstitutionally vague because "despite the ordinances' requirement that a communication must be *intended to induce a sale or listing for sale*," the municipality "believe[s] *every* 'business communication' from a real estate broker is a solicitation to list or sell . . . ." *Id.* at 1096 (emphasis in original). The court went on to find that the language of the ordinance thus "provide[s] insufficient warning that 'indirect' solicitation is prohibited . . . ." *Id.* Notwithstanding the constitutional defect, the trial court

found that the ordinances did not violate the Fair Housing Act, since "there was no substantial showing that the solicitation ordinances have a disparate impact on blacks and . . . there is no evidence of discriminatory intent with regard to the solicitation ordinance[s] . . . ." *Id.* at 1095. The Realtors appeal from the Fair Housing Act finding while the municipalities appeal the constitutional rulings.

A. Solicitation Restrictions under the Fair Housing Act

The Realtors assert that because the trial court found that "the ordinances are designed to keep residents from moving, to maintain the status quo and to reduce the ability of home seekers to find homes in the municipalities," *Id.* at 1093, they had the purpose and effect of making housing unavailable to blacks on account of their race. The Realtors contend that when the purpose of "keep[ing] residents from moving" is considered in light of the predominantly white population of the municipalities with anti-solicitation ordinances and the fact that many homeseekers are black, the anti-solicitation ordinances are discriminatory both in intent and in effect.

With respect to the Realtors' complaint that the ordinances were intended to discriminate against blacks, the trial court concluded that "the record is devoid of substantial evidence tending to show that the ordinances were intended to discriminate against blacks or any other racial group." *Id.* at 1094. We agree that the Realtors have pointed to nothing in the record that would even remotely demonstrate that the purpose of these facially neutral limitations on solicitation was to cause blacks to suffer racial discrimination.

The heart of the Realtors' Fair Housing Act challenge to these ordinances is that they had the racially discriminatory effect of preventing black home seekers from finding homes in the municipalities. However, the trial court concluded that:

> "[T]here is no substantial evidence tending to show that the solicitation ordinances have had a racially discriminatory effect. The purpose of the ordinance is to bar from solicitation only those who request it. Therefore the only families barred from receiving solicitations are precisely those who are least likely to offer their homes for sale anyway—families (black and white, newcomers and oldcomers) who have affirmatively indicated that they are not interested in moving or selling or listing their homes and do not want to be bothered by real estate salesmen looking for business. The solicitation ordinances are facially neutral and nondiscriminatory as to race and the evidence failed to establish that they are otherwise with regard to effect or result."

Id. at 1094-95.[15]

In our opinion the trial court's analysis of this issue is persuasive. In particular, we believe it is significant that "the only families barred from receiving solicitations are precisely those who are least likely to offer their homes for sale anyway . . . ." *Id.* at 1094. Consequently, any effect upon the sale of homes will be minimal because the only persons who cannot be contacted under the ordinances are those who have requested that their privacy not be disturbed and thus are not interested in receiving real estate solicitations.[16] In our opinion, the

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[15] The trial court then went on to specifically apply the test for determining whether a practice's effects result in discrimination set forth in *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d at 1290, and found that the ordinances were not racially discriminatory.

[16] We are unconvinced that the alleged problems the realtors may have with the deletion of names from mailing lists are a proper basis for holding that real estate activity is impeded. We believe interests in privacy are significant and important enough to require deletion of uninterested parties from mailing lists as a simple cost of doing business.

minimal effect the solicitation restrictions impose upon real estate activity causes no discernable discriminatory effect on the potential home buying public, even if it is predominantly black. Thus, the municipalities' limitations on Realtors' solicitation do not violate the Fair Housing Act.

B. Solicitation Restrictions under the First Amendment

As we turn to the district court's invalidation of the municipalities' solicitation restrictions on First Amendment grounds, we begin by noting a discrepancy between the trial court's disposition and our decision in *Curtis v. Thompson*, 840 F.2d 1291 (7th Cir. 1988). In *Curtis* we rejected a real estate broker's constitutionally based attempt to obtain a preliminary injunction against the Illinois state non-solicitation statute, which is comparable to the municipal ordinances at issue here.[17] The similarity between the municipal ordinances at issue in this case and the state statute involved in *Curtis* might certainly lead us to expect that our holding in *Curtis* would control the outcome here.

An examination of *Curtis* reveals that our affirmance of the district court's rejection of the real estate broker's request for a preliminary injunction against the Illinois real estate solicitation statute was based upon the broker's failure to demonstrate a "better than negligible chance of success" on the question of the statute's constitutional invalidity. *Curtis*, 840 F.2d at 1296 n.5. We began our

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[17] *See supra* note 5 for the text of the Illinois statute, Ill. Rev. Stat. ch. 38 § 70-51(d). The state statute is slightly broader than the municipal ordinances in that the statute bans all real estate solicitation of individuals who had provided a non-solicitation request while the municipal ordinances only prohibit solicitation in the home. The municipal ordinances are also a bit more specific than the state statute in that they set up a procedure whereby the involved municipality compiles a non-solicitation list while the state statute merely prescribed methods for developing such lists without providing that the state would compile the list.

First Amendment analysis with the recognition that "the speech in which Curtis wishes to engage is primarily aimed at proposing a commercial transaction, and should thus be classified as 'commercial speech.' " 840 F.2d at 1297 (citing *Bolger v. Young's Drug Products Corp.*, 463 U.S. 60 (1983)). While we recognized that the ban on real estate solicitation was "content based," 840 F.2d at 1297, we noted the flexibility the Constitution permits a sovereign state in enacting content-based regulations on commercial speech:

> "In the area of non-commercial speech, content-based restrictions (such as the one at hand) are sustained only in the most extraordinary circumstances: 'The First Amendment forbids the government from regulating speech in ways that favor some viewpoints or ideas at the expense of others.' [*Members of the City Council v.*] *Taxpayers for Vincent*, [466 U.S. 789, 804 (1984)]. This is because such 'core' First Amendment speech has always been considered essential to our survival as a democratic society: 'Free speech concerning public affairs is more than self-expression; it is the essence of self-government.' *Garrison v. Louisiana*, 379 U.S. 64, 74-75, 85 S.Ct. 209, 215-16, 13 L.Ed.2d 125 (1964). By contrast, regulation of commercial speech based upon content is less problematic. Because of the greater potential for deception or invasions of privacy in the context of some advertising methods, content-based restrictions on commercial speech are more often upheld."

Curtis, 840 F.2d at 1297-98 (citations omitted).

We went on to apply the four-part test for determining the validity of a restriction on commercial speech contained in *Central Hudson Gas and Electric Corp. v. Public Service Commission*, 447 U.S. 557, 100 S. Ct. 2343 (1980), commencing with the following quotation from *Central Hudson*:

> "In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within the provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest."

447 U.S. at 566, 100 S. Ct. at 2351. Applying the *Central Hudson* test, we initially determined that Curtis' speech was protected as it "concerns lawful activity and is not misleading." *Curtis*, 840 F.2d at 1298. In analyzing the interest involved, we noted the real estate broker's argument that the statute did not directly advance the state's interest in preventing inducements to sell real estate through appeals to fear of racial integration. But we refused to give these arguments controlling weight:

> "Curtis raises an interesting question when she questions whether the regulation does advance the government's interest in a meaningful way to prevent blockbusting, but this argument ignores another overriding interest the state of Illinois argues is served by the statute: the interest in insuring the privacy of the homeowner. In our view, that interest is more than sufficient to justify the limited curtailment of Curtis' right to speak to citizens in their homes.
>
> * * *
>
> "Unquestionably, Illinois' interest in ensuring the privacy of its residents while they are at home is strong and valid, even in the face of the First Amendment. The right to privacy sets America apart from totalitarian states in which the interests of the state prevail over individual rights; moreover, the unique importance of the right to privacy *in the home* has,

> from time immemorial, been amply demonstrated in our constitutional jurisprudence. As early as 1886, the United States Supreme Court recognized that the Fifth Amendment protects against all governmental invasions 'of the sanctity of a man's home and the privacies of life.' *Boyd v. United States*, 116 U.S. 616, 630, 6 S.Ct. 524, 532, 29 L.Ed. 746 (1886). The First Amendment has been held to encompass the right to 'privacy and freedom of association in the home.' *Moreno v. United States Dep't of Agriculture*, 345 F. Supp. 310, 314 (D.D.C. 1972), *aff'd*, 413 U.S. 528, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973)."

Curtis, 840 F.2d at 1299 (emphasis original). Furthermore, we said that "[w]hen the fundamental right to privacy clashes with the right of free expression, the interest in privacy does not play second fiddle when the speech is merely intended to propose a commercial transaction." *Id.* at 1300 (footnote omitted). We compared the Illinois statute to the federal statute involved in *Rowan v. United States Post Office Department*, 397 U.S. 728, 90 S. Ct. 1484 (1970), stating: "As in *Rowan*, the Illinois statute in this case circumscribes the mailer's right to communicate only by the addressee's taking affirmative action and giving notice to the mailer that he wishes no further mailings from his enterprise." *Curtis*, 840 F.2d at 1301. Applying the *Central Hudson* requirement of advancing the governmental interest, we held that:

> "Contrary to Curtis' argument, the regulation in issue meets the *Central Hudson* test because it directly advances the goal of insuring privacy in the home. As was the case in *Rowan*, once a homeowner expresses his or her desire not to receive certain types of literature he or she determines to be objectionable, there simply is no further right to press those ideas on the unwilling recipient . . . ."

Id. at 1302 (footnote omitted).

Based upon the above analysis, we formulated the following holding to explain why the Illinois statute restricting solicitation was valid under the First Amendment:

> "Our holding today is narrow: once a homeowner gives notice to a person that he or she does not desire to have the home listed for sale and that he or she does not desire to be contacted by real estate brokers who have previously been made aware of the decision, the right of a homeowner to decide what he or she will or will not hear, under the right to privacy, plainly outweighs the right of a real estate broker to continue to contact that person in his or her home. Once actual notice is received by a real estate agent, that agent is barred from contacting the homeowner for the purpose of persuading him or her to list the residence for sale. Our holding prevents neither a buyer nor a seller of real estate from contacting any person who had not notified the particular broker that he wishes to be left undisturbed."

Id. at 1304 (footnote omitted).[18]

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[18] The concurring judge agreed with the result reached by the court but believed *Rowan* to be distinguishable because "its holding was founded on the implied but obvious determination that the federal statute at issue there was content neutral and that it involved no '. . . discretionary evaluation of the material [by] a governmental official.' " *Curtis*, 840 F.2d at 1305. The dissent argued that "the merits of the plaintiff's constitutional argument must, at this very preliminary state of the litigation, be characterized as 'better than negligible.' " *Curtis*, 840 F.2d at 1308 (quoting *Brunswick Corp. v. Jones*, 784 F.2d 271, 275 (7th Cir. 1986)). He asserted that while "[t]he state certainly does have a strong interest in insuring the privacy of the home . . . there is no record to support the proposition that this statute directly protects that interest." *Id.* at 1307. He felt that "there is nothing in the record to support the conclusion that real estate solicitation is any more a threat to the privacy of the home than other forms of commercial intrusions." *Id.* The dissent also saw a problem with the final prong of the *Central Hudson* test, that the restriction be "not more extensive than is necessary to serve [the] interest," *Central Hudson*, 447 U.S. at 566, 100 S. Ct. at 2351, noting that the

(Footnote continued on following page)

The Realtors' challenge to the constitutionality of the municipal non-solicitation ordinances appears to recognize that our opinion in *Curtis* conflicts with their contentions but requests a re-evaluation and reversal of the *Curtis* decision. This we decline to do.

Before we address the specific contentions the Realtors raise concerning the constitutionality of these ordinances, we believe it important to briefly discuss a Supreme Court decision issued after our decision in *Curtis*, which directly spoke to the substantiality of the government interest in residential privacy. In *Frisby v. Schultz*, 487 U.S. 474, 108 S. Ct. 2495 (1988), the Supreme Court upheld against First Amendment challenge a local ordinance it interpreted to prohibit "focused picketing taking place solely in front of a particular residence . . . ." 487 U.S. at 483, 108 S. Ct. at 2501. In considering the interest in residential privacy the court recognized the importance of this basic interest:

> " 'The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.' *Carey v. Brown*, 447 U.S. [455,] 471, 100 S.Ct., at 2296 [(1980)]. Our prior decisions have often remarked on the unique nature of the home, 'the last citadel of the tired, the weary, and the sick', *Gregory v. Chicago*, 394 U.S. 111, 125 (1969) (Black, J., concurring), and have recognized that '[p]reserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value.' *Carey, supra*, 447 U.S., at 471, 100 S.Ct., at 2295."

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[18] *continued*
statute prevents "all real estate solicitation at any place (not just the home) at any time by any one." *Curtis*, 840 F.2d at 1307. He further questioned how directly *Rowan* supported our holding, since the statute in *Rowan* allowed recipients to "refuse any mail," and the Illinois statute only permitted restriction of "solicitations with respect to residential realty" and provided that the "recipient may apparently bar any message directed to him anywhere." *Id.* at 1308.

487 U.S. at 484, 108 S. Ct. at 2502. Then in language particularly relevant to the facts of our case, the Court emphasized the right of the resident to avoid speech intruding upon residential privacy and the right of governmental entities to enact legislation to facilitate the exercise of that right:

> "One important aspect of residential privacy is protection of the unwilling listener. Although in many locations, we expect individuals simply to avoid speech they do not want to hear, the home is different. 'That we are often "captives" outside the sanctuary of the home and subject to objectionable speech . . . does not mean we must be captives everywhere.' *Rowan v. Post Office Dept.*, 397 U.S. 728, 738 (1970). Instead, a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom. *See, e.g., FCC v. Pacifica Foundation*, 438 U.S. 726, 748-749 (1978) (offensive radio broadcasts); *id.*, at 759-760 (Powell, J., concurring in part and concurring in judgment) (same); *Rowan, supra* (offensive mailings); *Kovacs v. Cooper*, 336 U.S. 77, 86-87 (1949) (sound trucks).
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> "This principle is reflected even in prior decisions in which we have invalidated complete bans on expressive activity, including bans operating in residential areas. *See, e.g., Schneider v. State*, 308 U.S. 147, 162-163 (1939) (handbilling); *Martin v. Struthers*, 319 U.S. 141 (1943) (door-to-door solicitation). In all such cases, we have been careful to acknowledge that unwilling listeners may be protected when within their own homes. In *Schneider*, for example, in striking down a complete ban on handbilling, we spoke of a right to distribute literature only 'to one willing to receive it.' Similarly, when we invalidated a ban on door-to-door solicitation in *Martin*, we did so on the basis that the 'homeowner could protect himself from

> such intrusion by an appropriate sign "that he is unwilling to be disturbed." ' *Kovacs, supra*, 336 U.S. at 86. We have 'never intimated that the visitor could insert a foot in the door and insist on a hearing.' *Ibid.* There simply is no right to force speech into the home of an unwilling listener."

Frisby, 487 U.S. at 484-85, 108 S. Ct. at 2502 (citations omitted).

In light of the Supreme Court's powerful endorsement of the right of residential privacy in *Frisby*, the Realtors understandably do not challenge the proposition that residential privacy is a substantial governmental interest. Instead, they center upon the five municipal ordinances' alleged failure to conform to the final two prongs of the *Central Hudson* test. The Realtors assert that the ordinances do not "directly advance" the government's substantial interest in residential privacy and that the means the ordinances utilize are more extensive than necessary to serve their residential privacy purpose.

The Realtors' argument that the ordinances at issue fail to directly advance the interest in residential privacy focuses upon the ordinances' alleged "underinclusiveness." Specifically, the Realtors contend that the ordinances address only real estate solicitation when there is no demonstration that real estate solicitation is any greater threat to residential privacy than any other form of solicitation. We rejected this argument in *Curtis*:

> "Curtis responds that the statute is underinclusive because it does not prohibit forms of mail other than real estate solicitations from entry in the home. Mere underinclusiveness does not, however, amount to constitutional infirmity. As explained previously, a restriction on commercial speech may well be valid where it 'directly advances the governmental interest asserted, and . . . is not more *extensive* than is necessary to serve that interest.' *Central Hudson*, [447 U.S. at 566]. While the Illinois statute could have been *more* extensive, the state's decision to limit the scope of the statute does not translate into a constitutional problem . . . ."

840 F.2d at 1302-03 (footnote omitted, emphasis in *Curtis*). Thus, as in *Curtis*, the "underinclusiveness" of the ordinance fails to prevent it from advancing the government's interest in protecting residential privacy.

We now turn to the Realtors' argument that the solicitation restrictions in the municipal ordinances are without a reasonable relationship to the residential privacy purpose of these ordinances because the constraints are more extensive than necessary. In *Curtis* we stated that "if the state's decision as to where to draw the line between ends and means is reasonable, a court may not use its own findings to upset a plausible state decision." *Curtis*, 840 F.2d at 1303 n.11. As a general matter, the Realtors attack *Curtis* for this deference to legislative judgments in determining what constitutes the reasonable relationship between a law and the purpose of a law necessary to guarantee that the restrictions in the law are not more substantial than necessary to achieve its purpose. In response to the Realtors' contention, we point out that the Supreme Court's later decision in *Board of Trustees v. Fox*, 492 U.S. 469, 109 S. Ct. 3028 (1989), confirms our position in *Curtis* concerning the necessity to permit legislative bodies to exercise appropriate discretion concerning the tailoring of a law's means to achieve its ends:

> "In sum, while we have insisted that ' "the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing . . . the harmless from the harmful," ' *Shapero* [*v. Kentucky Bar Ass'n*, 108 S. Ct. 1916, 1924 (1988)], quoting *Zauderer* [*v. Office of Disciplinary Counsel*, 471 U.S. 626, 646 (1988)], we have not gone so far as to impose upon them the burden of demonstrating that the distinguishment is 100% complete, or that the manner of restriction is absolutely the least severe that will achieve the desired end. What our decisions require is a ' *"fit" between the legislature's ends and the means chosen to accomplish those ends,' Posadas*, 478 U.S. at 341, 106 S. Ct., at 2977—*a fit that is not necessarily perfect, but*

> *reasonable*; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served,' *In re R.M.J.* [455 U.S. 191, 203 (1982)]; that employs not necessarily the least restrictive means but, as we have put it in the other contexts discussed above, a means narrowly tailored to achieve the desired objective. Within those bounds we leave to governmental decisionmakers to judge what manner of regulation may best be employed."

Fox, 109 S. Ct. at 3034-35 (emphasis added).

The Realtors present a two-faceted challenge to the appropriateness of the means used in the municipal solicitation restriction for achieving the ordinances' purposes. Initially, the Realtors make a broad attack on our reasoning in *Curtis* that the Supreme Court's recognition in *Rowan* of a governmental power to protect unwilling recipients from solicitation in their own homes supports the constitutionality of the Illinois statute. This attack, if successful, would presumably invalidate the Illinois statute and any municipal limitation upon realtor solicitation of unwilling residents, irrespective of the restriction's scope. The second aspect of the Realtors' challenge is that, as the district court held, there is not a proper tailoring of the means of the ordinances to their ends because their "effect of banning all communication by mail from Realtors is far more extensive than necessary," to achieve the government's interest in "protecting the privacy of citizens who desire such protection" and "promoting the appearance of racial stability and avoiding fears of blockbusting and racial unrest." *South-Suburban Housing Center*, 713 F. Supp. at 1095. Success on this contention would invalidate a proscription of communications which do not directly solicit a real estate listing while permitting some restriction on direct solicitation of unwilling residents.

As stated above, the Realtors broadly contend that the Country Club Hills, Matteson, Glenwood, Hazel Crest and Park Forest ordinances do not utilize means which are appropriately suited to the goal of residential privacy be-

cause they do not involve mere attempts to facilitate the ability of objecting individuals to refuse to receive material under *Rowan*. The Realtors attempt to distinguish this case from *Rowan* by seizing upon language in the statute at issue in *Rowan* that provided that the householder could insulate himself from advertisements that offer for sale "matter which the addressee *in his sole discretion* believes to be erotically arousing or sexually provocative," 39 U.S.C. § 4009(a) (emphasis added), which means that

> "[i]n operative effect the power of the householder under the statute is unlimited; he may prohibit the mailing of a dry goods catalogue because he objects to the contents—or indeed the text of the language touting the merchandise. Congress provided the sweeping power not only to protect privacy but to avoid possible constitutional questions that might arise from vesting the power to make any discretionary evaluation of the material in a governmental official."

Rowan, 397 U.S. at 737, 90 S. Ct. at 1491. The Realtors note that both the concurrence and the dissent in *Curtis* saw a distinction between the *Rowan* statute and the *Curtis* statute, which arguably would preclude absolute reliance upon *Rowan* as a rationale for upholding either the municipal anti-solicitation ordinances or the Illinois statute in *Curtis*.

With deference to the concurring and dissenting judges in *Curtis*, we are convinced that the ordinances at issue here and the statute in *Rowan* are materially indistinguishable for First Amendment purposes. In both legislative plans a householder is provided with the right to insulate himself from a particular category of communications. In *Rowan* the Supreme Court upheld the validity of a federal law permitting a householder to elect not to receive material that the householder believed to be "erotically arousing or sexually provocative." 39 U.S.C. § 4009(a). Indeed, the Supreme Court's discussion of the householder's right to control the receipt of unwanted mail has implications far beyond the statute at issue there:

> "In today's complex society we are inescapably captive audiences for many purposes, but a sufficient measure of individual autonomy must survive to permit every householder to exercise control over unwanted mail. To make the householder the exclusive and final judge of what will cross his threshold undoubtedly has the effect of impeding the flow of ideas, information, and arguments that, ideally, he should receive and consider. Today's merchandising methods, the plethora of mass mailings subsidized by low postal rates, and the growth of the sale of large mailing lists as an industry in itself have changed the mailman from a carrier of primarily private communications, as he was in a more leisurely day, and have made him an adjunct of the mass mailer who sends unsolicited and often unwanted mail into every home. It places no strain on the doctrine of judicial notice to observe that whether measured by pieces or pounds, Everyman's mail today is made up overwhelmingly of material he did not seek from persons he does not know. And all too often it is matter he finds offensive. . . . Weighing the highly important right to communicate, but without trying to determine where it fits into constitutional imperatives, against the very basic right to be free from sights, sounds, and tangible matter we do not want, it seems to us that a mailer's right to communicate must stop at the mailbox of an unreceptive addressee."

Rowan, 397 U.S. at 736-37, 90 S. Ct. at 1490. This case is similar to *Rowan* in that it involves local ordinances authorizing a resident's insulation from solicitation "intended to induce the sale, rental or listing for sale or rental of [a] dwelling" or "to offer or promote services in connection with the sale, rental or listing of [a] dwelling." Both in *Rowan* and the instant case it is the householder who is required to take the initiative in determining that he does not wish to receive the material. The *Rowan* Court's broad explanation of a householder's right to exclude unwanted mail fails to eliminate the similarity be-

tween the content-specific statute in *Rowan* and the content-specific ordinances at issue here. The district court's distinction between *Rowan* allowing "a resident to insulate himself from a particular mailer" and the authority granted in the ordinances to "exclude an entire class of mailers based upon occupation and content," *South-Suburban Housing Center*, 713 F. Supp. at 1102, is immaterial. Regardless of whether a single mailer or an entire class of mailers are involved, "a mailer's right to communicate must stop at the mailbox of an unreceptive addressee." *Rowan*, 397 U.S. at 736-37, 90 S. Ct. at 1490.

Although the Realtors would prefer the total invalidation of the municipal non-solicitation ordinances, they also argue, as the district court held, that the ordinances are constitutionally invalid because they effectuate the rights of unwilling residents to bar the receipt of mere indirect promotional material (realtor mailings not directly seeking a listing or sale of real estate) as well as direct attempts to solicit real estate. We fail to see any reason why the distinction between direct realtor solicitation and indirect realtor promotional material is relevant to the relationship between the means utilized in the non-solicitation ordinances and their end of protecting residential privacy. Both materials which "directly" solicit a real estate listing and those that are merely "indirect" disturb a person who wants nothing to do with any sort of real estate solicitation. Thus, the municipal ordinances restricting solicitation are appropriately tailored to serve the important purpose of protecting residential privacy.

In sum, we remain convinced that *Curtis* was properly decided. The municipal ordinances at issue here, like the Illinois solicitation restrictions in *Curtis*, "directly advance" the interest in residential privacy and exhibit a reasonable relationship between means and ends that guarantees that the restrictions are not more extensive than necessary to achieve their residential privacy purpose. Thus, we reverse the district court's decision invalidating the ordinances under the First Amendment.

C. Vagueness

The trial court also invalidated the ordinances involved on the basis of vagueness. The court held that "[t]he text of the ordinances provide insufficient warning that 'indirect' solicitation is prohibited and thus they are unconstitutionally vague." *South-Suburban Housing Center*, 713 F. Supp. at 1096.[19]

In *Penny Saver* we dealt with the issue of the vagueness of a previous version of Hazel Crest's restriction on solicitations. The former ordinance's definition of solicitation did not exempt advertisements in newspapers of general circulation. The publisher of a local newspaper, the Penny Saver brought an action for injunctive relief, declaratory relief and damages, alleging that the ordinance was unconstitutionally vague. The district court granted declaratory relief, holding that the former ordinance was vague, and awarded damages to Penny Saver for lost advertising revenues.[20] In upholding the district court's vagueness conclusion, we describe the basic standard applicable to a vagueness challenge: "If this Ordinance's provisions concerning solicitation are so vague that 'men of common intelligence must necessarily guess at its meaning,' *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926), then it is void for vagueness." *Penny Saver*, 905 F.2d at 155. Applying this standard, we held that:

> "[T]he Village's Ordinance was impermissibly vague because it failed to inform the advertisers of the specific conduct that would render them liable. It purported to regulate real estate solicitations yet failed

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[19] Examples of such "indirect" solicitation that could be considered prohibited, in the district court's view, were the following contacts between real estate brokers and homeowners: "an exchange of business cards, a friendly chat while showing homes in a neighborhood, introducing new neighbors, or the announcement of the opening of a new office."

[20] The request for injunctive relief had become moot, for the Village amended its ordinance to make it inapplicable to newspapers.

> to clearly define whether the Penny Saver's real estate advertisements were within the realm of the definition. This was compounded by the Village's enforcement practices. The Village had prosecuted Benkendorf for his advertising in the Penny Saver and stated its future intentions to actively enforce the Ordinance. Thus the advertisers were required to speculate as to the meaning of the Ordinance. *See Hynes*, 425 U.S. at 620. The language of the Ordinance did not provide the kind of precision which is required in statutes affecting first amendment interests and the extent of enforcement by the Village was unclear. *See id.* at 620. Because of this uncertainty, advertisers were apparently 'chilled' in the exercise of their first amendment rights. Rather than risk prosecution under the Ordinance, they relinquished advertising in the Penny Saver entirely. Accordingly, we hold, as did the district court, that the Village's Ordinance was unconstitutionally vague as applied to potential advertisers in newspapers."

Penny Saver, 905 F.2d at 155 (footnote omitted).

In contrast to *Penny Saver*, we rejected a vagueness challenge to the Illinois solicitation restrictions noted above in *Curtis*:

> " 'A statute is fatally vague only when it exposes a potential actor to some risk or detriment without giving him fair warning of the nature of the proscribed conduct.' *Rowan*, 397 U.S. at 740, 90 S.Ct. at 1492. In this case appellant knows precisely what she must refrain from doing on receipt of statutory notice. The complainants' names must be removed from any mailing the broker may have, and the broker must refrain from future communications to the named addressees. Appellant runs no substantial risk of miscalculation."

Curtis, 840 F.2d at 1304 n.12. The same analysis is applicable here. The clear and unambiguous terms of the ordinances (see ordinance provisions *supra* at 9-10), direct the Realtors precisely as to what they must do when they

receive a copy of the list of householders who wish to exclude real estate solicitations from their mail: They must simply remove the names of the parties from their mailing lists and refrain from future communication to these addressees who do not desire solicitation. As in *Curtis*, we fail to see a "substantial risk of miscalculation" when a party provides the requisite statutory notice, and thus, the statute is not unconstitutionally vague.

D. Equal Protection

The Realtors finally urge that the ordinances violate the Equal Protection Clause because they discriminate against the Realtors' speech through permitting homeowners to insulate themselves from real estate solicitations but not from other forms of speech. In *Curtis* we summarily disposed of an equal protection challenge to a similar statute, stating that: "Curtis' claim that the statute violates equal protection because it has no rational basis is without merit. Our holding that the provision directly advances the state's interest in insuring the privacy of homeowners forecloses Curtis' equal protection challenge." *Curtis*, 840 F.2d at 1304 n.12. *Curtis* was a clear application of the Supreme Court's reasoning in *Posadas de Puerto Rico Associates v. Tourism Co.*, 478 U.S. 328, 344 n.9, 106 S. Ct. 2968, 2978 n.9, where the Court held that "[i]f there is a sufficient 'fit' between the legislature's means and ends to satisfy the concerns of the First Amendment, the same 'fit' is surely adequate under the applicable 'rational basis' equal protection analysis." The discussion above established that there is a reasonable relationship between the legislature's means and ends.

The Realtors, however, argue that the analysis in *Posadas* is inapplicable herein, since *Posadas* concerned speech regarding an activity which could be banned entirely (casino gambling) while the speech involved here concerns an activity (real estate marketing) that the state could not entirely suppress. The Realtors' argument would have merit if the municipalities with anti-solicitation ordinances

directly banned real estate solicitations from all households in their communities. But this argument must fall, for the ordinances at issue are narrowly drafted to merely make it possible for the individual homeowner to elect not to receive a particular category of speech. *Rowan* and *Curtis* establish that there is no problem under the First Amendment when federal and state entities establish a particular classification of mailed communications which a householder can choose not to receive. Like the Supreme Court in *Posadas*, we fail to see any distinction between First Amendment "sufficient fit" analysis and the Fourteenth Amendment "rational basis" inquiry. We are convinced that when a municipality provides homeowners with the option of excluding objectionable speech from their mail through an ordinance satisfying free speech concerns, the exclusionary provision also satisfies the "rational basis" concerns of the Equal Protection Clause.

V. THE REALTORS' CHALLENGE TO THE MUNICIPALITIES' RESTRICTIONS ON "FOR SALE" SIGNS

The Realtors appeal from the trial court's determination that limitations on the size, placement and number of real estate "for sale" signs contained in the ordinances of Country Club Hills, Matteson, Park Forest and University Park were valid regulations of the place and manner of the involved speech. The Realtors further appeal from the district court's decision upholding the constitutionality of Country Club Hills' requirement that a permit be obtained for the display of a "for sale" sign. Finally, the Realtors appeal from the trial court's failure to hold that Glenwood's enforcement of a "for sale" sign ban followed by repeal of the ban on the eve of trial violated 42 U.S.C. § 3604(a) of the Fair Housing Act and merited an award of punitive damages under 42 U.S.C. § 3612(c).[21]

[21] The trial court rendered neither findings of fact nor conclusions of law on the Fair Housing Act issues allegedly raised in Glenwood's conduct.

A. Restrictions on Size, Placement and Number of "For Sale" Signs

The municipalities have enacted a variety of regulations on the size, placement and number of real estate "for sale" signs on a given piece of real estate. As in the case of the municipalities' solicitation restrictions, we must determine whether these limitations on commercial speech satisfy the four-part test the Supreme Court promulgated in *Central Hudson*. It is clear that "for sale" signs contain expression concerning a lawful activity, sale of a home, and are not misleading. Thus, the questions to be resolved are "whether the regulation[s] directly advance[ ] the governmental interest asserted, and whether [they are] not more extensive than is necessary to serve that interest." *Central Hudson*, 447 U.S. at 566, 100 S. Ct. at 2351.

The trial court found that the declared purpose for each of the municipalities' restrictions on "for sale" signs was the promotion of aesthetic appearance. *See South-Suburban Housing Center*, 713 F. Supp. at 1090. There is nothing in the record that leads us to conclude that these aesthetic interests, declared in either the preamble or the text of the ordinances involved, were not the genuine purposes of each ordinance. Thus, we must determine whether the ordinances "directly advanced" the asserted aesthetic interests. There can be little doubt that the limitations on the number of "for sale" signs per property found in the ordinances of Matteson, Park Forest, Country Club Hills and University Park advance concerns for proper physical appearance. A proliferation of signs in a residential community certainly detracts from the beauty of that community. Likewise, the restrictions on the size of signs found in the ordinances of Matteson, Park Forest and Country Club Hills facilitate aesthetic concerns. A large sign is a greater intrusion on a residential neighborhood's appearance than is a smaller sign. Finally, the sign placement provisions contained in each City's or Village's ordinance contribute to neighborhood beauty. Uniform placement of signs in the window of a home or a regulated distance from it insures that the signs will not prove as

unsightly as haphazard placement. Thus, the municipal ordinances directly advance the legitimate governmental interest in the beauty of residential neighborhoods.

The more difficult question is whether there exists a reasonable relationship between the means the ordinances utilize and their purpose of promoting the quality of the residential neighborhood's appearance. As we noted in our discussion of the constitutionality of the municipalities' solicitation restrictions, the Supreme Court has given considerable leeway to legislative bodies in determining the appropriate means to further a legitimate governmental interest, even when enactments incidentally limit commercial speech. *See Board of Trustees v. Fox*, 109 S. Ct. at 3034-35.

The restrictions on the number of signs a seller may display on each property further the localities' interest in aesthetics while permitting a "for sale" sign to inform interested persons of the availability of a home. Because the record fails to demonstrate that these regulations prevent interested persons from learning a home is for sale, we conclude that they are "not more extensive than is necessary to serve [the government's legitimate] interest" in the appearance of its residential neighborhoods. As the trial court found, there is

> "little evidence that the sign regulations resulted in measurable lost income for realtors, that the regulations had a discriminatory impact on black home seekers, *or that they denied access to housing to anyone.* Therefore the court finds the sign regulations . . . are modest and reasonable."

South-Suburban Housing Center, 713 F. Supp. at 1090-91 (emphasis added).

B. Country Club Hills' Permit Requirement

The Realtors also challenge Country Club Hills' requirement that a permit carrying a fee of $60.00 be obtained for the display of a "for sale" sign in that City. The trial court rejected the Realtors' attack, holding that:

> "[T]he evidence submitted showed that Country Club Hills charged a fee and required an application for a permit for other commercial signs in residential areas. There was no evidence that the fees charged exceeded the administration costs."

South-Suburban Housing Center, 713 F. Supp. at 1103 (citations omitted).

The Supreme Court has established that a governmental body may enact a reasonable permit fee requirement to defray the cost of administering permissible regulation of a particular form of speech. *See Cox v. New Hampshire*, 312 U.S. 569, 576-77 (1941). There can be no question that the imposition of Country Club Hills' permit fee directly advances the City's aesthetic purposes in defraying the expenses necessary to enforce its regulations of real estate signs. But, the issue remains of whether the trial court properly found that permit fees did not exceed the cost of the administration of the "for sale" sign regulations, thus maintaining the necessary correlation between the ordinance's means and ends.

The Realtors assert that the district court's finding was improper because the City bears the burden of proof in justifying a restriction on commercial speech, and its failure to affirmatively demonstrate the specific costs it incurred in administering its ordinances regulating "for sale" signs meant that there was not the required relationship between the permit fee and the ordinances' purpose. We agree with the Realtors: "since the State bears the burden of justifying its restrictions, it must affirmatively establish the reasonable fit we require." *Fox*, 109 S. Ct. at 3035 (citation omitted). The Supreme Court has consistently invalidated fees that do not bear a rational relationship to the services involved in providing permits or licenses for communicative activities. *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 110 S. Ct. 688, 694 (1990); *Follett v. Town of McCormick*, 321 U.S. 573 (1944); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Grosjean v. American Press Co.*, 297 U.S. 233

(1936). Since the City must justify restrictions on commercial speech, and the cost of a permit must be reasonably related to the City's cost in administrating the same, Country Club Hills was required to carry the burden of demonstrating that its permit fee of $60.00 for 6 months is not excessive in that it did not exceed the City's costs in enforcing its real estate sign regulations. Nonetheless, the City failed to present any specific evidence of dollar figures reflecting either the revenue it generated from its sign permit fees or its costs in administering its sign regulations. Because of the failure of Country Club Hills to demonstrate a reasonable relationship between its permit fees and administrative costs, we hold that the municipality's permit fee ordinance is unconstitutional.

C. Glenwood's Enforcement and Cessation of Enforcement of its "For Sale" Sign Ban

The Realtors finally allege that the trial court erred in failing to find Glenwood in violation of 42 U.S.C. § 3604(a)[22] and subject to punitive damages under 42 U.S.C. § 3612(c) for its enforcement of an allegedly constitutionally invalid ban on real estate "for sale" signs until shortly prior to the commencement of trial. The trial court rendered neither specific factual findings nor conclusions of law on this issue in either its initial decision or in its supplementary decision on the parties' motions to alter or amend the judgment. The record suggests that this failure may not have been entirely the fault of the trial court because the Realtors' post-trial motion, while asking for various amendments of the court's findings of fact, conclusions of law and judgment made no mention of the court's failure to render specific factual findings or legal conclusions on this issue.

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[22] "[I]t shall be unlawful—To . . . make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin."

The questions of whether Glenwood violated the Fair Housing Act and whether its conduct merits an award of punitive damages are important and complex issues. Appellate review of the district court's judgment on these questions requires analysis of the trial court's reasoning that led it from a determination of the facts involved to an ultimate finding of discrimination or the absence thereof. To the extent the trial court in this case might be considered to have made a finding of non-discrimination, the absence of specific findings of fact or conclusions of law on this issue means that "we are unable to follow the district court's chain of reasoning . . . ." *Andre v. Bendix Corp.* (*Andre I*), 774 F.2d 786, 800 (7th Cir. 1985). Since the "district court's findings are inadequate for meaningful appellate review and we are unable to ascertain its reasoning," we remand this issue. *Id.* at 801. However, because the evidentiary record has been fully developed, we do not believe a new trial is required and we will "remand[ ] to the same judge for further findings [or proceedings if necessary]," *id.*, with respect to the questions of whether Glenwood's enforcement and cessation of enforcement of its "for sale" sign ban violated the Fair Housing Act and called for an award of punitive damages. Circuit Rule 36 shall not apply.

VI. CONCLUSION

In sum, we affirm the trial court's holding that the Realtors lack standing to pursue their consitutional claims as well as its dismissal of the Realtors' challenge to SSHC and Park Forest's implementation of the Apache Street affirmative marketing plan, since we hold that the AMP did not violate the Fair Housing Act. We also affirm the trial court's dismissal of SSHC's attacks on the Realtors' exclusion of the Apache Street listing from the MLS and commencement of disciplinary proceedings against William H. Motluck on the basis that this conduct also does not violate the Fair Housing Act. We affirm the trial court's dismissal of the Realtors' attempts to invalidate the regu-

lations of size, placement and number of "for sale" signs per property in Country Club Hills, Matteson, Park Forest and University Park because the Realtors have failed to demonstrate that these provisions violate the First Amendment. But, we reverse the trial court and invalidate Country Club Hills' $60.00 "for sale" sign permit fee requirement because of the City's failure to demonstrate that this fee was related to the cost of administrating its real estate sign regulations. We also reverse the trial court's determination that the anti-solicitation ordinances of Country Club Hills, Matteson, Glenwood, Hazel Crest and Park Forest violated the First Amendment and were unconstitutionally vague. We hold that these ordinances are devoid of constitutional infirmity, and we affirm the district court's holding that the anti-solicitation ordinances are not violative of the Fair Housing Act. Finally, we remand to the district court judge for findings on the question of whether Glenwood's enforcement and pre-trial cessation of enforcement of its "for sale" sign ban violated the Fair Housing Act and required an award of punitive damages.

AFFIRMED IN PART,
REVERSED IN PART,
REMANDED IN PART.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT—WITH ORAL ARGUMENT

Date: June 19, 1991

Before:

Honorable Harlington Wood, Jr., Circuit Judge
Honorable John L. Coffey, Circuit Judge
Honorable Joel M. Flaum, Circuit Judge

Nos. 89-2115, 89-2122, 89-2123, 89-2218,
89-2767, 89-2777, 89-2778, and 89-2846

SOUTH SUBURBAN HOUSING CENTER,

Plaintiff-Appellee

v.

GREATER SOUTH SUBURBAN BOARD OF REALTORS, an Illinois not-for-profit corporation and NATIONAL ASSOCIATION OF REALTORS, an Illinois not-for-profit corporation,

Defendants/Counterplaintiffs-Appellants

v.

CITY OF BLUE ISLAND, VILLAGE OF CALUMET PARK, CITY OF COUNTRY CLUB HILLS, et al.,

Counterdefendants-Appellees

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 83 C 8149, Judge Harry D. Leinenweber

These causes were heard on the record from the above mentioned district court, and were argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court in these causes appealed from be, and the same are hereby, AFFIRMED in part, REVERSED in part, and REMANDED in part, in accordance with the opinion of this Court filed this date. Each party shall bear their own costs.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 5, 1991.

Before

Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge*

Nos. 89-2115, 89-2122, 89-2123, 89-2218,
89-2767, 89-2777, 89-2778, 89-2846

GREATER SOUTH SUBURBAN BOARD OF REALTORS and NATIONAL ASSOCIATION OF REALTORS,

Defendants, Counterplaintiffs-Appellants, Cross-Appellees,

v.

CITY OF BLUE ISLAND, et al.,

Counterdefendants-Appellees, Cross-Appellants.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 89 C 8149—Harry D. Leinenweber, *Judge*.

ORDER

On consideration of the petition for rehearing in the above-entitled cause filed by plaintiff-appellee, cross-appellant, and the petition for rehearing with suggestion for

rehearing *in banc* filed by defendants, counterplaintiffs-appellants, cross-appellees, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petitions for rehearing be, and the same are hereby, DENIED.

[713 F.Supp. 1068 (N.D.Ill. 1988)]

SOUTH-SUBURBAN HOUSING CENTER, an Illinois not-for-profit corporation, Counter-Defendant 7-21-84,

v.

GREATER SOUTH SUBURBAN BOARD OF REALTORS, an Illinois not-for-profit corporation, National Association of Realtors, an Illinois not-for-profit corporation, Counter-Plaintiffs, Cross-Plaintiffs,

v.

CITY OF BLUE ISLAND, Village of Calumet Park, City of Country Club Hills, Village of Glenwood, Village of Hazel Crest, Village of Matteson, Village of Park Forest, Village of Richton Park, Village of University Park, Counter-Defendants.

No. 83 C 8149.

United States District Court,
N.D. Illinois, E.D.

Dec. 19, 1988.

As Corrected
April 27, 1989.

* * * * *

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

LEINENWEBER, District Judge.

COMPLAINT

FINDINGS OF FACT[1]

1. Plaintiff in this action is the South Suburban Housing Center, an Illinois not-for-profit corporation ("SSHC" or "Housing Center"). The SSHC carries on its activities within a Chicago, Illinois suburban area that is described in No. 4 of these Findings of Fact. The SSHC states that its purposes are to "promote and encourage multi-racial communities in the South Suburbs" of Chicago and "promote open housing to all people regardless of race." (Tr. 170, 346-47, Klepper; PX23) The SSHC's activities include providing assistance to homeseekers, "testing" for discriminatory real estate practices and suing those found to be engaged in such practices, conducting fair housing educational programs for realtors, apartment rental agents and the public, and assisting various government units in carrying out fair housing efforts. (Tr. 190-92, 215, 253-59, 266-67, 259-61, 286-89, Klepper) Christine Klepper ("Klepper") has been the Executive Director of the SSHC from 1980 to the present. (Tr. 190, Klepper)

2. The first named of two defendants in this action is the Greater South Suburban Board of Realtors[2] (the "GSSBR" or the "Board"). The GSSBR, an Illinois not-for-profit corporation, is an association of licensed real estate brokers and salesmen and a local affiliate of the

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[1] To the extent that any of the Findings of Fact reflect legal conclusions, they shall be deemed Conclusions of Law; and, to the extent that any of the Conclusions of Law reflect factual findings, they shall be deemed Findings of Fact.

[2] "Realtor" is a federally registered collective mark owned by the National Association of Realtors and is properly used only in reference to members of the Association. However at risk of violation of trademark law, the term "realtor" is used in this opinion to include all persons engaged in the sale or lease of real estate.

other named defendant in this action, the National Association of Realtors ("NAR"). (Counterclaim, ¶ 3) The GSSBR carries on its activities within approximately the same Chicago, Illinois suburban area in which the SSHC operates, and operates therein a real estate multiple listing service ("MLS") that is described in Nos. 25-27 of these Findings of Fact. Robert Turpin ("Turpin") was Executive Vice President of the GSSBR for "close to twenty years" and the chief operating officer of the GSSBR MLS at all times relevant to this action. (Tr. 625-27)

3. The second named defendant in this action is the NAR, an Illinois not-for-profit corporation, and an association of licensed real estate brokers and salesmen which provides policy guidance and materials and services of various sorts to its local affiliates, including the GSSBR. (Counterclaim, ¶ 2; Tr. 1471-80, North) William D. North ("North") was Senior Vice President and General Counsel of the NAR from 1980 to 1986, at which time he became Executive Vice President of the NAR. (Tr. 1459-63, 2114-15, North)

4. Both the SSHC and the GSSBR carry on their respective activities within approximately the same area in south Cook County and a small portion of northern Will County, Illinois. The area referred to (the "South Suburban Area") includes approximately thirty-seven municipalities and is bordered on the north by the southern border of the City of Chicago, on the west roughly by Harlem Avenue or Interstate 57, on the south roughly by the northern border of Will County (except that a few Will County communities are included in the South Suburban Area), and on the east by the Indiana state line. (Tr. 171-72, Klepper; Tr. 373-75, Pearson)

The South Suburban Area

5. As of 1970 the suburban communities south and southwest of Chicago had almost no black residents, including the communities immediately west and northwest of the South Suburban Area, Alsip, Burbank, Bridgeview, Chicago Ridge, Evergreen Park, Hickory Hills, Hometown, Oak Forest, Oak Lawn, Orland Park, Palos Hills, Palos Park, Palos Heights, Tinley Park, West Haven and Worth (collectively the "Southwest Suburban Area"). (MX500A; MX481A and 481C) In the South Suburban Area however several small communities, such as Robbins and Phoenix, had virtually all black populations from their inception; a few communities, such as Blue Island and Chicago Heights, had substantial black enclaves for many years; and a few others, such as Park Forest and University Park, had growing non-negligible black populations. *Id.*

6. During the period from 1970 to 1980 some communities in the central corridor of the South Suburban Area, directly south of the south side of Chicago, experienced substantial racial change while communities to the east and to the west continued to have negligible black populations. (Tr. 6843-48, Orfield; Tr. 1107-08, K. Williams; MX500A) For example, by 1980 the population of University Park had become 44.3 percent black; the population of both Harvey and Markham had become about two-thirds black; and the population of Calumet Park and Chicago Heights had become 30 percent and 28.8 percent black, respectively. (MX500A) In municipalities immediately adjacent to these communities there was also significant racial change; the populations of Country Club Hills, Hazel Crest and Matteson each changed from less than one percent to approximately 12 percent black. *Id.*

During the same decade some communities in the eastern portion of the South Suburban Area and the entirety of the Southwest Suburban Area remained with negligible black populations. (Tr. 1107, K. Williams; Tr. 6845-46, Orfield; MX481A and 481B; MX500A) Racial enrollment data for elementary school districts indicates that since 1980 the same pattern of racial change has continued and in some cases accelerated in communities in the South Suburban Area, while the black population of the Southwest Suburban Area has remained negligible. (Tr. 6860-62, Orfield; MX480-81, 481A, D and E)

7. These racial settlement patterns in the South Suburban Area, where historically all white areas experience integration and are subsequently threatened with resegregation, result from a complex mix of market forces. These market forces include racial prejudice: some whites and some blacks prefer to live in segregated communities; the belief that high concentrations of blacks result in a drop in home values; the expectation that an integraged community will eventually become segregated; and housing search practices that are reinforced by certain real estate practices. (Tr. 621; 4483-84; 6809-10)

8. Certain real estate practices tend to exacerbate the problem. Realtors, like any salesmen, adopt marketing strategies that will maximize sales at minimum effort. For example, since realtors make more money selling in house listings, realtors push these houses. Since black realtors tend to have listings from black clients[3] they tend to push listings in black or integrated neighborhoods to their pros-

[3] According to standard realtor nomenclature, a homeowner who gives a listing to a realtor is a "client"; a person seeking a home through a realtor is a "prospect"; as soon as a prospect makes an offer he becomes a "customer."

pects who also are mostly black. White realtors push listings in white neighborhoods to their white customers for the same reasons. (Tr. 350; 363, 1115; 7588-92)

Advertising strategies complement these sales efforts. Realtors advertise in the communities in which they expect to make the most sales. This means black realtors advertise in black communities and white realtors in white communities. (Tr. 73; 1115-16; 2653-61; 6069)

In short, realtors have little incentive in promoting integration for the sake of integration. They are interested in making sales. Accordingly, they are followers and not leaders of change in housing patterns.

9. In order to counter these market forces and to promote integrated living in the South Suburban Area, the SSHC has attempted to influence the housing market by encouraging the sales and marketing of real estate in what it terms to be "non-traditional" ways, i.e., encouraging whites to move to black or integrated areas and blacks to move to white or integrated areas. (Tr. 202-07)

Plaintiff's Definition of "Affirmative Marketing"

10. "Affirmative Marketing", according to plaintiff, consists of race conscious efforts to promote integration or prevent segregation through special marketing of real estate to attract persons of particular racial classifications who are not likely to either be aware of the availability or express an interest in the real estate without such special efforts. Affirmative marketing is multi-racial in that it approves of and encourages efforts to attract whites to racially integrated areas as well as blacks to racially segregated areas. (PX27)

11. "Affirmative Marketing" insofar as it involves special outreach to whites is controversial and has among its most vociferous critics some mainline black organizations who feel that such marketing efforts stigmatize blacks and tend to make housing less available to blacks. (DX41; DX44; Tr. 615-16) Others, principally the realtors, contend that affirmative marketing to whites is "benign steering" and quite possibly illegal. (Tr. 1649-63) If, for example, realtors assess that special outreach to whites is appropriate, they contend that they could be prosecuted for steering if their assessment is determined to be inaccurate.

The NAR/HUD Voluntary Affirmative Marketing Agreement

12. In 1979 the United States Department of Housing and Urban Development ("HUD") and the NAR executed a Voluntary Affirmative Marketing Agreement ("VAMA"). It provides a uniform approach to fair housing for NAR's boards and members. Acceptance of the VAMA eliminated the need for signatories to promulgate any other affirmative marketing plans but did not preclude them from doing so. (DX456)

13. The VAMA defines affirmative marketing "as a program to inform the *minority community* of the homes listed for sale or rent by Realtors, of the services offered by Realtors in selecting a home for purchase, and of the availability of these homes and services to all buyers without regard to race, color, religion, sex or national origin" (emphasis supplied). Thus the VAMA requires special outreach to minorities only. (DX456) This form of affirmative marketing is justified as remedial; i.e., to open areas that had previously been closed to minorities because of past discriminatory practices.

The Apache Street Listings

14. William Motluck ("Motluck") of Century 21-Host Realty ("Host") was the broker with whom the SSHC listed the three Apache Street homes involved in this case. (Tr. 325, Klepper) Motluck and Host were participants in the MLS, paid all fees charged by the MLS and had entered into agreements which bound them to comply with the MLS rules and regulations. (Answ. to complt., ¶¶ 13, 32) Motluck had performed the duties required of him under those agreements, including submission of his exclusive listings to the MLS. (DX549, p. 248)

15. The three homes involved in this action are on Apache Street, a horseshoe-shaped street of some forty-seven homes located in the northeast corner of the Eastgate subdivision in the Village of Park Forest, Illinois. (PX11; Tr. 141, Bean) Eastgate is bounded by Western Avenue on the west, 26th Street on the south, forest preserves on the east and the Beacon Hill and Forest Heights subdivisions of the City of Chicago Heights on the north. (PX11; Tr. 135-36, Bean)

16. Forest Heights subdivision, immediately north of the Apache Street area (MX582, pp. 364-65; PX11), was built beginning in 1970 and the majority of the homes were sold to blacks, many from Chicago's south and west side ghettos (MX582, p. 356) and by 1972 the population in Forest Heights was 99 percent black. *Id.* Racial turnover ensued in Beacon Hill, the subdivision immediately west of Forest Heights, which also adjoins Eastgate. *Id.*, pp. 355-56. (PX11) During 1970-1971 the Beacon Hill School which was a part of a Park Forest School District serving the Beacon Hill-Forest Heights area as well as parts of Park Forest, including Eastgate, had changed from 25 to 90 percent black and had become a racially identifiable

school. It was the only such one in Park Forest School District 163. (MX582, p. 360)

17. The evidence also indicated that as black families moved onto Apache Street in the early 1970's rumors had begun to circulate that the Eastgate area was going black. Many whites wanted to sell their houses and brokers began to steer whites away from the area. *Id.*, p. 365. Although the situation stabilized by the time of the 1980 census, the census black including Apache Street (No. 207) had become over 56 percent black, more than double the black population of any other census block in Eastgate. (MX582, p. 365; PX18-19; Tr. 149-51, 156, Bean; Tr. 1245, 1253, K. Williams; DX131)

18. At the time relevant to this action, homeseeking traffic on Apache Street was "predominantly black" (Motluck dep., p. 95) and there had been very little white demand for housing for some time. (Tr. 322, Klepper) The real estate industry in Park Forest was "knowledgeable" about Apache Street and its "makeup" and perceived that Apache Street was a "black block" on which whites were underrepresented. (Tr. 637-44, Turpin)

19. VA and FHA mortgage foreclosures in Eastgate leading to abandoned homes and neighborhood blight were an ongoing problem. (Tr. 141, Bean) In response to this problem Park Forest began a program of acquiring vacant or abandoned homes, chiefly by purchase from the United States Department of Housing and Urban Development ("HUD") or the Veteran's Administration ("VA"), rehabilitating the homes, and then reselling them. (Tr. 141, Bean; PX12)

20. Pursuant to this program Park Forest in 1982 purchased the vacant homes at 9, 15 and 26 Apache Street (the "Apache Street homes") from HUD or the VA. (Tr.

141-42, Bean) In September of 1982 Park Forest published a notice seeking bidders to purchase, rehabilitate and resell the Apache Street homes. (PX13)

21. On September 23, 1982 the SSHC submitted a proposal to Park Forest for the acquisition, rehabilitation and resale of the Apache Street homes, including affirmative marketing. (PX14; Tr. 145-46, Bean) Based on its analysis of a variety of data the SSHC had determined that without special outreach efforts few white homeseekers would be attracted to the Apache Street homes. (Tr. 322-23, Klepper)

22. On November 1, 1982 the Park Forest Board of Trustees voted to accept the SSHC's proposal for the acquisition, rehabilitation and resale with affirmative marketing of the Apache Street homes. (Tr. 146, Bean; DX142A-C) The SSHC then bought the three Apache Street homes and began to rehabilitate them. (Tr. 323-24, Klepper)

23. The SSHC and Motluck then entered into listing agreements for the Apache Street homes. (PX15-17) The listing included an affirmative marketing plan ("AMP"). (Tr. 1240-43, 1249-50, K. Williams) The AMP provided that Motluck was to use his "best efforts to attract minority and majority persons" to the Apache Street homes (PX15-17; AMP, ¶ 1), make a special outreach to whites by advertising in newspapers with a predominantly white circulation and distributing information to rental developments and employers where whites could be reached, *id.*; AMP, ¶ 3, and collect data on persons shown the homes, including their race. (*Id.*; AMP, ¶¶ 5, 7) The listings forbade "any action which prohibits, restricts, narrows or limits the housing choice of any client on the basis of race." (PX15-17; AMP, ¶ 4)

24. Through its village manager Park Forest reviewed and approved the Apache Street AMP as consistent with the Park Forest/SSHC contract. (Tr. 148-49, Bean)

25. The special outreach efforts provided for in the Apache Street listing agreements were to be carried out by Motluck alone; the agreements did not require other MLS participants, the MLS itself, or anyone other than Motluck to engage in special outreach activities. (PX15-17; Tr. 673, Turpin) No obligations were imposed upon MLS participants by inclusion of the Apache Street listings in the MLS; participants remained free to ignore the listings. (Tr. 660-62, Turpin) However, if a MLS participant chose to show Apache Street homes to a customer he was to provide Motluck with certain information about the customer, including race, either before or after the showing. (Tr. 1031-33, Klepper; PX15-17; AMP, ¶ 7) Lock boxes were provided for the Apache Street homes and all MLS participants had keys for such boxes which they could use to show the homes without any advance notice to Motluck. (Tr. 7492, Klepper)

26. The listing agreements for 9, 15 and 26 Apache Street were signed, respectively, on April 5th, April 10th and June 13, 1983. (PX15-17; Tr. 328, Klepper) Motluck submitted the listings to the MLS (Motluck dep., p. 34) and they were published in the MLS book. (PX55; Tr. 648-49, Turpin) The information which the MLS published concerning the Apache Street homes was exactly the kind of information published on all other homes listed (i.e., price, size, location, etc.); there was no reference in the MLS publication to affirmative marketing or special outreach. (PX55) The listings as published indicated that access to the homes was available by means of a lock box so that Realtors could enter and show the homes to homeseekers without contacting Motluck. (PX55; Tr. 7492, Klepper)

27. There was no evidence at all that the SSHC intended Motluck to reduce or that Motluck in any way reduced his efforts to market the Apache Street properties to blacks; in fact since his commission was contingent upon successfully marketing the properties to any purchaser regardless of color, and since homeseeking traffic in Eastgate was predominantly black, it would be easier to market the properties to blacks. Therefore he had a strong market incentive to market the properties in a way to reach the maximum number of blacks as well as whites.

The GSSBR Multiple Listing Service

28. The Board operates a multiple listing service ("MLS") a facility by which a MLS member broker makes a blanket unilateral offer of subagency to all other MLS participants with respect to a home listed with that broker. (Tr. 1499-1500) The MLS computer database contains information about homes listed for sale with its members. MLS members and their homeseeking prospects can review this data via computer terminals or by reviewing printed compilations distributed to members on a biweekly basis. (Tr. 2638-39)

29. The GSSBR's MLS is governed by its rules and regulations which provide, *inter alia*, that for a fee and agreement to submit all listings to the MLS, the MLS shall be available to participating Realtors and that the MLS reserves the right to refuse to accept a listing which in the opinion of its legal counsel failed "to protect adequately the interest of the public and the participants." (DX34)

30. On June 24, 1983 the GSSBR, based upon the advice of its legal counsel, Stuart Lindenberg ("Lindenberg"), removed the Apache Street listings from the MLS. The reason that the listings were removed was because

in the opinion of Lindenberg they were very possibly illegal and would violate the MLS rules and regulations and the concern that the data collection under the listings might constitute illegal racial steering.

The court finds that the removal was done in good faith and was not a pretense for discrimination.

Equal Opportunity Commission
Complaint Against Motluck

31. On June 24, 1983 the Equal Opportunity Commission ("EOC") voted against Lindenberg's advice to file a complaint against Motluck pursuant to Article 10 of the NAR's Code of Ethics (Tr. 479-83, Pearson; Tr. 7423, Lindenberg), Article 10, which is intended to "track" the Fair Housing Act (Tr. 2202-04, North), provides:

> "The Realtor shall not deny equal professional services to any person for reasons of race, creed, sex, or country of national origin. The Realtor shall not be party to any plan or agreement to discriminate against a person or persons on the basis of race, creed, sex, or country of national origin."

(PX48, p. 29).

32. The EOC voted to file its complaint against Motluck because the Apache Street agreements called for "special outreach . . . to whites rather than to minorities." (Tr. 479-82, 491, Pearson) The EOC's position, based upon the HUD/NAR VAMA, was that special outreach to white homeseekers gave rise to a violation of Article 10. (Tr. 483-84, 486-87, Pearson)

33. Turpin was present during the EOC meeting of June 24, 1982. (Tr. 480, Pearson) On that day, after the EOC voted to file its complaint against Motluck, Turpin

withdrew the Apache Street listings from the MLS. (Answ. to complt., ¶ 19; Tr. 676, Turpin)

The court finds that the filing of the complaint was done in good faith and not a pretense for discrimination.

Indemnification Agreement

34. Some time after the withdrawal of the listings from MLS, very late in June or early July, Turpin first contracted North about the listings. (Tr. 1649-50, North) Turpin then sent North a copy of the Apache Street listings. (Tr. 1650, North) North examined the listings, but with other documents (Tr. 2510-11), and then drafted an Indemnification Agreement ("Agreement"). (Tr. 1670, North; PX44) The Agreement began as follows:

> "WHEREAS, Century 21-Host Realty [i.e., Motluck's company] requires its subagents to employ race-conscious criteria by the South Suburban Housing Center ('SSHC') when determining which prospective buyers to introduce to property owned by the SSHC and listed with Century 21-Host Realty; and
>
> "WHEREAS, the Greater South Suburban Board of REALTORS, Inc. ('the Board') is concerned that the use of such criteria may violate federal or state fair housing laws or the Illinois real estate licensing law . . . ' "

(PX44, p. 1) The Agreement called upon the SSHC and Motluck's company to indemnify the GSSBR and its members from all liability, including damages, costs, attorney's fees and other expenses by reason of any legal proceeding arising out of the Apache Street listings. (PX44, pp. 1-2)

35. On July 5, 1983 North sent Turpin a letter enclosing the Agreement (DX162) and a letter stating the NAR's recommendation that the GSSBR allow MLS ac-

cess for the Apache Street listings only upon condition that the Housing Center and Motluck sign the agreement. *Id.* At trial North said that his "concerns" respecting the Apache Street listings (Tr. 1650-69) led him to recommend indemnification because he believed the listings could lead to "legal liability" or "potential exposure" of the MLS or MLS participants under legal prohibitions against steering. (Tr. 1671-72)

36. The justification advanced by defendants for thus conditioning MLS access for the Apache Street listings was North's asserted belief that the listings called for actions which "likely" were racial steering and therefore could lead to "legal liability" or "potential exposure" for the MLS or MLS participants.

The court finds that this justification was made in good faith and was not a pretense for discrimination.

Plaintiff's Claims

37. The Housing Center asserts that defendants have violated its rights under Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601 *et seq.* (the Fair Housing Act), and at common law through their treatment of certain real estate listings (the "Apache Street listings" described in No. 23 of these Findings of Fact), particularly because (1) the GSSBR threatened the Housing Center's broker and then brought a formal ethics complaint against him for entering into the Apache Street listings, (2) for a time the GSSBR unconditionally denied the Apache Street listings access to its MLS, and (3) thereafter defendants conditioned access to the MLS for such listings upon a requirement that the Housing Center and its broker indemnify the GSSBR and its members from all liability and expenses occasioned by any legal proceeding out of the Apache Street listings.

CONCLUSIONS OF LAW

1. Jurisdiction

1. This court has jurisdiction over the subject matter of this action and counterclaim pursuant to 42 U.S.C. §§ 3612, 3617; 28 U.S.C. §§ 1331, 1334; 42 U.S.C. §§ 1982, 1983; 28 U.S.C. §§ 2201-02; and upon this court's pendent jurisdiction.

I. Fair Housing Act Claims

A. *Section 3604(a)*

2. Section 3604(a) of the Fair Housing Act makes it unlawful "[to] . . . make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin . . ." 42 U.S.C. § 3604(a) There are two recognized methods of proving a Section 3604(a) violation: by proving discriminatory intent or by proving discriminatory effect. *Metropolitan, etc. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir.1977).

(i) Intent

3. The actions of defendants were motivated by other than discriminatory intent; the actions of defendants were motivated by a strong philosophical disagreement as well as a deep concern for the legality of the Apache Street listings' AMP. Although the court upholds the legality and constitutionality of the Apache Street AMP (Conclusion No. 8, *infra*, pp. 1087-88), there was substantial room for disagreement, on both the legal and the philosophical front. In any event there was insufficient evidence to establish that defendants' concerns over illegality were a pretense for discrimination.

(ii) Effects

4. *Arlington Heights* provides the Section 3604(a) standard when, as here, a plaintiff alleges that racially-neutral behavior created a discriminatory effect. *See, Phillips v. Hunter Trails Community Assn.*, 685 F.2d 184, 189 (7th Cir.1982). The four *Arlington Heights* factors to be considered are:

> 1) the strength of the showing of discriminatory effect;
>
> 2) some evidence of discriminatory intent;
>
> 3) the party's interest in taking the action complained of; and
>
> 4) whether the plaintiff seeks to compel the defendant to affirmatively further, or merely keep the defendant from interfering with, the fair housing activity.

Arlington Heights, 558 F.2d at 1290.

5. There are two different ways a facially-neutral decision can produce a discriminatory effect: (a) when that action has a greater adverse impact on one racial group than another; or (b) when the decision "perpetuates segregation." *Id.*

6. The actions of defendants did not have a racially disparate impact on white homeseekers in the south suburbs. The purpose of plaintiff's affirmative marketing with special outreach to whites was to increase the likelihood that whites would view the Apache Street properties in numbers beyond what would be expected if normal marketing techniques were used. Therefore plaintiff's affirmative marketing itself has a racially disparate impact. To the extent that defendants' activities may decrease the impact of affirmative marketing would not itself equal disparate impact.

7. The inability of Motluck to use the MLS did not perpetuate segregation. Plaintiff and its broker were free to continue with their special outreach activities. The actions of defendants in denying use of its MLS if anything would make it more difficult to sell the homes to blacks because cooperating brokers had no affirmative marketing obligations themselves and were knowledgeable about Apache Street, its racial and demographical makeup, and that there was little white demand. (Findings of Fact, ¶ 13)

8. The uncontradicted testimony of Turpin, Lindenberg, and others established that close adherence to the VAMA and their fear of being charged with racial steering motivated the Board's refusal to participate in the Apache Street plan. (Findings of Fact, ¶ 30) Defendants' desire to comply with the VAMA is a substantial interest deserving of deference from the court. *See, Hennessey v. NCCA*, 564 F.2d 1136, 1142-43 (5th Cir.1977) (holding that where collegiate athletic association was formed, in part, to adopt rules to govern its members, it was inappropriate for the court to reject the association's reasonable interpretation of its own bylaws).

Defendants' attempt to avoid liability for the Apache Street plan in what was perceived to be uncertain legal terrain is a legitimate and normal precautionary practice. Therefore the interest of defendants in taking the action complained of was legitimate and not a pretense for discrimination.

9. Although the relief sought, the inclusion of certain listing agreements into defendants' MLS, seeks to compel defendants to assist in its affirmative marketing activities, the intrusion is not severe. However this factor is not determinative. *Arlington Heights*, at 1295.

10. Accordingly, the court finds that plaintiff has failed to prove a violation of Section 3604(a) under either intent or effects analysis.

B. *Section 3606*

Section 3606 of the Fair Housing Act proscribes the denial or conditioning of access to a MLS "on account of race." 42 U.S.C. § 3606. Defendants' actions were not racially motivated. The requested indemnification was for reasons which were not pretextual for racial discrimination. The court therefore finds that defendants' actions did not violate Section 3606 on this claim for the same reasons as those stated with respect to the SSHC's claim under Section 3604(a).

C. *Section 3617*

11. Section 3617 of the Fair Housing Act prohibits interference with the enjoyment of fair housing rights. 42 U.S.C. § 3617. But that section does not under the circumstances of this case provide an independent ground for liability. In *Arlington Heights* the Seventh Circuit noted that "where the conduct that allegedly violated Section 3617 is the same conduct that allegedly violated Section 3604(a) and was engaged in by the same party, the validity of the section 3617 claim depends upon whether the [conduct] violated section 3604(a)." 558 F.2d at 1288 n. 5. *See*, also, *Atkins v. Robinson*, 545 F.Supp. 852, 865 (E.D.Va.1982), *aff'd* 733 F.2d 318 (4th Cir.1984). Consequently, since the SSHC failed to establish that the NAR and the GSSBR's actions violated Sections 3606 or 3604(a), its claim under Section 3617 also fails.

II. Breach of Contract

12. The SSHC also alleges that it was a third-party beneficiary of an "agreement" between Motluck and the MLS and that the Board breached that "contract" by requesting indemnification from Motluck and the SSHC.

13. However the SSHC did not establish an essential element of its third-party beneficiary claim, breach of contract between GSSBR and Motluck. The MLS rules and regulations do not require the GSSBR to publish whatever listings Motluck chose to submit. Section 12 clearly states that the MLS through its legal counsel may "refuse to accept a listing form which fails to protect adequately the interests of the public and the participants." This provision granted the GSSBR discrimination to act as it did with respect to the Apache Street listings when, as here, the court found that the decision of the legal counsel was not pretextual. (Findings of Fact, ¶ 27; Conclusions of Law, ¶ 3) Thus, even if the SSHC was a third-party beneficiary of the alleged "MLS contract," its breach of contract claim would lose under the express terms of the MLS rules. *See, R & L Grain Co. v. Chgo. Eastern Corp.*, 531 F.Supp. 201, 209 (N.D.Ill.1981).

III. Tortious Interference

14. In order to prove a claim for tortious interference with prospective economic advantage, a party must establish the following elements: (1) a reasonable expectancy of an economic advantage (here entering into contracts for the sale of homes); (2) knowledge of the expectancy by defendants; (3) the intentional wrongful interference with the expectancy; and (4) damages resulting from defendants' actions. *Knapp v. McCoy*, 548 F.Supp. 1115, 1117 (N.D.Ill.1982); *Tom Olesker's Exciting World of*

Fashion v. Dun & Bradstreet, Inc., 16 Ill.App.3d 709, 306 N.E.2d 549, 553 (1st Cir.1973), *rev'd in part on other grounds*, 61 Ill.2d 129, 334 N.E.2d 160 (1975).

15. The SSHC has failed to show that defendants' alleged interference was "wrongful" or intended to injure the SSHC. *See, R.H. Donnelley Corp. v. IBT*, 595 F.Supp. 1202, 1208 (N.D.Ill.1984). Defendants' motive was not to interfere with the SSHC's attempts to sell the Apache Street homes; they wanted to protect the Board and its MLS participants from exposure to suit or liability. Since defendants were pursuing legitimate business and legal interests when they acted on the Apache Street plan, their actions do not approach the level of legal malice required to sustain the SSHC's claim. *Bank Computer v. Continental Ill. Nat. Bank*, 110 Ill.App.3d 492, 66 Ill.Dec. 160, 167, 442 N.E.2d 586, 593 (1982). *See, Petit v. Cuneo*, 290 Ill.App. 16, 22, 7 N.E.2d 774, 777 (1st Cir.1937) ("one who has an interest may take action to protect his rights.")

Accordingly, Counts I, II and III of plaintiff's complaint are dismissed.

COUNTERCLAIM

FINDINGS OF FACT[4]

I. Parties

1. Counterplaintiffs in this action are the Greater South Suburban Board of Realtors ("GSSBR") and the National Association of Realtors ("NAR") (collectively "counterplaintiffs" or "Realtors").

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[4] The court adopts the Findings of Fact on the complaint and the Findings of Fact on the counterclaim to the extent they are relevant.

As a professional association of real estate brokers and salesmen, the NAR's organizational goals are to (1) help its members understand and comply with laws governing the sale of housing—in particular fair housing laws—thereby reducing its members' risk of violating such laws, (2) promote its members and the profession, and (3) establish a free and open housing market which operates without regard to race. (Tr. 1475-76) The NAR has invested substantial time and money in developing a comprehensive program to attain these goals. That program includes establishing bylaws, regulations and training programs that assist Realtors in complying with fair housing laws (Findings of Fact, ¶¶ 3-6), entering into the NAR's VAMA (Findings of Fact, ¶¶ 7-9), and assisting members in challenging regulations and legislation that unconstitutionally restrict Realtors' or the public's right to a market founded on the principles of equal opportunity and free choice. (Tr. 1577-83; DX78)

2. In addition to counterdefendant South Suburban Housing Center ("SSHC" or "Housing Center"), there are five remaining municipal counterdefendants (or "municipalities") in this case: the City of Country Club Hills, the Village of Glenwood, the Village of Hazel Crest, the Village of Matteson and the Village of Park Forest. A sixth municipality—the Village of University Park—is in the case only with respect to counterplaintiffs' challenge of its "for sale" sign regulation.[5]

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[5] There were originally nine municipal counterdefendants in the case. To streamline adjudication and because of the similarity of purpose and effect of challenged ordinances and programs among the nine municipal counterdefendants, the court entered two agreed orders on September 1, 1987. These orders provided that, with respect to the municipalities of Blue Island, Calumet Park, Richton Park and (except with respect to its real estate sign ordinance) University Park, the court would "make no findings and grant no

(Footnote continued on following page)

3. Country Club Hills has a city form of government, with a mayor elected at large and eight aldermen elected, two from each of four wards. (Tr.6498) It is located in the central corridor of the South Suburbs, bordered by Markham, Flossmoor, Hazel Crest and unincorporated areas. (MX481) As of 1980 Country Club Hills' population was approximately 14,767—eighty-four percent white and twelve percent black. (MX500A) It has twelve subdivisions (MX510A) and approximately three thousand owner-occupied and twelve hundred renter-occupied households. (MX478K, Table 26)

4. Hazel Crest was incorporated in 1912. It has a village form of government, with a president and board of trustees elected at large and a village manager. (Tr.6321) It is also located in the central corridor of the South Suburbs, bordered by Markham, Harvey, East Hazel Crest, Homewood, Flossmoor and Country Club Hills. (Tr. 6322; MX481) As of 1980 Hazel Crest's population was approximately 14,000—eighty-six percent white and twelve percent black. (MX500A) The present population is still estimated to be 14,000, of which now sixty to sixty-five percent is white and twenty-five to thirty percent is black. (Tr.6278-79; 6360-61) Hazel Crest has ten subdivisions and approximately thirty eight hundred owner-occupied and approximately six hundred sixty renter-occupied households. (MX478T, Table 26)

5. Glenwood was originally settled in 1835 and incorporated in 1903. (Tr.5745) It has a village form of govern-

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[5] *continued*
relief" in this case, in return for which each of those four municipalities agreed to abide by any relief granted by the court against the remaining municipal counterdefendants which related to an ordinance in effect in substantially identical form in any of the four municipalities.

ment, with six trustees and a mayor elected at-large. (Tr.5741-42) Glenwood is also located in the central corridor of the South Suburbs, approximately bordered by Thornton, Homewood, Flossmoor and Chicago Heights, with Cook County forest preserves around its remaining borders. (MX481) In 1980 Glenwood's population was approximately 10,500—eighty-nine percent white and ten percent black. (MX500A) Glenwood's current population is still estimated to be 10,500—approximately eighty to eighty-five percent white and fifteen to twenty percent black. (Tr.5746; 5753) Glenwood has five subdivisions and approximately twenty three hundred single family homes, seven hundred condominiums and four to five hundred apartment units. (Tr.3360; 3687; 5743-45; MX478R, Table 26)

6. Matteson has a village form of government, with a president, board of trustees and village manager. Matteson is located in the southern half of the central corridor in the South Suburbs and is bordered by Olympia Fields, Park Forest and Richton Park. (MX481) In 1980 Matteson's population was 10,233—of which approximately twelve percent was black and eighty-three percent white. (MX500A) Matteson has eight neighborhoods or subdivisions (MX251-58) and approximately twenty five hundred owner-occupied and seven hundred renter-occupied households. (MX478AA, Table 26)

7. Park Forest was initially developed in 1947 and incorporated in 1949. (Tr.4976) Park Forest has a village form of government with a board of trustees, village president and village manager. It is located at the south end of the central corridor in the South Suburbs bordered by Chicago Heights, Olympia Fields, Matteson, Richton Park and University Park. (MX481) In 1980 Park Forests population was approximately 26,000—eighty-eight percent

white and twelve percent black. (MX500A) While its population is still the same composition it is now approximately eighty-three percent white and seventeen percent black. (Tr.4979; 4981) There are fifty five hundred single family homes, twenty three hundred co-ops or condominium townhouses, six hundred thirty townhomes and seven hundred high-rise rental units in Park Forest. (TR.4990)

8. University Park has a village form of government and is also located at the far southern end of the central corridor in the South Suburbs. (MX481) It is bordered by Park Forest, Richton Park, Monee and unincorporated areas. (MX481) As of 1980 University Park's population was 6,245—fifty-three and one-half percent white and forty-four and three tenths percent black. (MX500A) Within its borders there are approximately twelve hundred forty owner-occupied and eight hundred twenty renter-occupied households. (MX478WW, Table 26)

II. Nature of the Action

9. Counterplaintiffs' second amended counterclaim is a six-count attack against the fair housing policies of the SSHC and certain fair housing and other policies and ordinances of the municipalities. As set forth below, not all counts seek relief against every counterdefendant. Count I alleges that the Apache Street AMP of counterdefendants SSHC and Park Forest violates the Fair Housing Act and Sections 1982 and 1983 of the Civil Rights Act. Count II asserts that the so-called "integration maintenance" programs of all counterdefendants are a pattern and practice of racial steering and discrimination which violates the Fair Housing Act, the Constitutional right of equal protection and Sections 1982 and 1983. Count III

attacks Hazel Crest's "for sale" sign ban and the sign placement and size regulations of Country Club Hills, Matteson, Park Forest and University Park, alleging that those ordinances violate the First Amendment, the Fair Housing Act and Sections 1982 and 1983. Count IV is directed against the solicitation ordinances of the municipal counterdefendants and alleges that those ordinances, both facially and as applied, violate the First Amendment, due process and equal protection, Sections 1982 and 1983 and the Fair Housing Act. Count V alleges that Glenwood and Matteson's fair housing data reporting ordinances violate privacy rights, equal protection and due process, the First Amendment, Section 1982 and 1983 and the Fair Housing Act. Count VI alleges that profit/not-for-profit distinctions in the fair housing ordinances of the municipal counterdefendants violate equal protection and Section 1983 and are preempted by Section 3615 of the Fair Housing Act.

10. Although the counterclaim originally sought damages as well as equitable relief, counterplaintiffs withdrew their damage claims at the commencement of trial and never offered any evidence as to damages. Consequently only claims for declaratory and injunctive relief remain with respect to each count.

CONCLUSIONS OF LAW

I. Standing of the NAR and the GSSBR

1. The NAR and the Board have standing under Article III of the Constitution and Title VIII to assert their counterclaims because they have allegedly suffered a distinct and palpable injury that is fairly traceable to counterdefendants' conduct and because relief from the injury would be likely to follow from a favorable decision. *See*,

Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 261-62, 97 S.Ct. 555, 561-62, 50 L.Ed.2d 450 (1977). Counterdefendants' programs and ordinances allegedly impair the NAR and the Board's ability to attain their organizational goals by interfering with their activities, policies and programs and causing a consequent drain on their resources. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380, 102 S.Ct 1114, 1125, 71 L.Ed.2d 214 (1982). In addition they have standing as representatives of their members because they satisfy the three requirements for representational standing: (1) their members have standing; (2) the interests the NAR and the Board seek to protect are genuine to their organizational purpose; and (3) neither the claims asserted nor the relief requested requires the participation of individual members. *Hunt v. Washington Apple Advertising Comm.*, 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383 (1977). Counterdefendants' arguments as to standing tend to go to the merits of counterplaintiff's claims rather than to the nature of the injury complained of. *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343 (1985).

2. Counterplaintiffs also have standing to assert claims under Sections 1982 and 1983 because of the allegations that counterdefendants' actions interfere with the right to market real estate to blacks. Here counterplaintiffs have taken steps to develop and implement its VAMA which they allege is being undermined by counterdefendants. *Warth v. Seldin*, 107 S.Ct. at 2210.

Prudential considerations have also been met. Here the alleged injury is specific to counterdefendants' members whose rights are being asserted. *Warth*, p. 2206.

FINDINGS OF FACT

COUNTS I and II

1. The SSHC conducts the following programs that are objected to by counterplaintiffs.

a. *Assistance to Homeseekers*

Counterplaintiffs apparently do not challenge the SSHC's assistance to black south suburban residents victimized by racial harassment, nor the SSHC's efforts to help CHA families, mainly black, find housing in the south suburbs. These activities are plainly inconsistent with a purpose of restricting the number of black South Suburban Area residents.

Although the counterclaim (¶ 35c) refers to homeseeker "counseling services sponsored by either SSHC or the municipalities," counterplaintiffs' counsel indicated at trial they are not attacking some part or all of the SSHC Homeseekers Service ("Service"). (Tr.7506) In any event, the evidence indicates that the SSHC's Service "is a supplement to the normal housing market" which any homeseeker may use if he chooses. (Tr.209, Klepper) The Service provides the same assistance to blacks or whites, although the "traditional" and "nontraditional" choices which are discussed with blacks and whites differ because, given the normal housing search patterns, blacks are unlikely to consider all white areas and whites are unlikely to consider all black or rapidly integrating areas. (Tr.7296-97, Matthews; Tr.201-02, 208-09, Klepper; Tr.5371-74, Cardona)

The SSHC makes "clear to everyone" assisted by the Service that "[t]he final choice is always that of the individual." (Tr.209, Klepper; PX23; PX96) Service clients

are asked to read cards which explain the SSHC's policy and state "SSHC works with homeseekers individually to expand options to include total marketplace" and "the final choice is always that of the individual." (PX23; PX96) If homeseekers decide "they want traditional housing listings, we will give them those . . ." (Tr.208, Klepper) Ultimately, a "few more families make nontraditional moves than traditional." (Tr.211, Klepper)

b. *Testing and Compliance Activities*

The evidence indicates that the SSHC's testing and litigation activities have been designed to "open up" housing options and combat discrimination, particularly with respect to blacks. Although the counterclaim asserts that SSHC tests are used "to force Realtors to comply with . . . integration maintenance programs" (counterclaim, ¶ 35(b)), counterplaintiffs' counsel withdrew that allegation during the trial. (Tr.7508-12)

c. *Educational Activities*

Counterplaintiffs apparently do not challenge many of the SSHC's educational activities including those designed to inform Realtors and the public about fair housing laws. Counterplaintiffs do appear to challenge the SSHC's education about affirmative marketing. (Counterclaim, ¶ 35(d)) Respecting such activities, the evidence indicates that the SSHC ". . . always says[s] affirmative marketing is absolutely not to limit anybody's housing choice. It's to do exactly the opposite." (Tr.268, Klepper) SSHC literature distributed to Realtors during seminars states "Affirmative Marketing is assisting homeseekers individually to expand options to include the total marketplace . . . The final choice is always that of the individual." (PX27) The

evidence indicates that during the seminars the SSHC stresses that "you never take anything away from somebody. You only add something," and the goal should be "100 percent of the people competing for 100 percent of the housing." (Tr.220, 226, Klepper) Although several hundred GSSBR Realtors have attended SSHC seminars (Tr. 228, Klepper), counterplaintiffs offered no evidence from any Realtors that the SSHC's message has ever been different.

Similarly, the SSHC's guide for apartment managers and rental agents (PX29) states:

> "Affirmative Marketing is a method of providing *information* to racial groups least likely to apply for housing . . . The goal: to promote racially diverse traffic and demand for housing." (PX29, p. 3)
>
> "Affirmative Marketing had nothing to do with racial 'quotas.' No person can be lawfully denied access to the housing of his or her choice because of race. The legitimate function of promoting residential racial diversity cannot be done by limiting the options of individuals." (PX 29, p. 11)

The principles embodied in the quoted language are always part of the information about Affirmative Marketing that the SSHC gives to rental agents. (Tr.255, Klepper)

d. *Apache Street*

The SSHC's stated purpose in entering into and implementing the Apache Street listings was to add some "white traffic to the properties in addition to the black traffic," not to decrease or restrict the black traffic. The relevant evidence supports a finding that that was in fact the SSHC's purpose. (Cmplt., Findings of Fact, ¶ 27)

e. *SSHC Activities in General*

Respecting all of the SSHC's activities, Klepper testified:

> "We [are] about encouraging racial diversity. We are about promoting demand from blacks and whites in housing . . . Whatever the racial makeup of the community turns out to be, whatever it is, as long as it is the result of free choice, people making fully informed decisions, not decisions based on past discrimination, not decisions based on past discriminatory housing practices, not based on fears, not based on perceptions, you know, true free choice; and whatever the community turns out to be is what it turns out to be . . .
>
> "We're talking about ending a dual housing market where people do not have free choice. That is what we're talking about. Expanded housing opportunities.
>
> "We are not about restricting anybody's housing choice. We make recommendations to expand housing choice . . . It doesn't mean if you suggest to a black family something in addition to University Park that you don't offer University Park. You don't take anything away. You add something . . ."

2. The court finds that the effect of the SSHC activities has not been to "restrict" or "control" access to housing but rather to expand the information about housing available for consideration by homeseekers and to promote racially diverse living and the prevention of resegregation.

3. In addition to the foregoing, the complaint attacks the foregoing as being elements of municipal "integration maintenance programs." (Counterclaim, ¶¶ 25-31, 35) The evidence presented at trial demonstrated that the SSHC (and not the municipalities) has controlled and implemented most of the programs challenged. The specific municipal

efforts appear to be advertising and marketing campaigns of Hazel Crest, Matteson and Glenwood.

4. There was no evidence presented that the purpose of any advertising or marketing efforts was to deny equal housing opportunity, restrict access to housing, manipulate choice, or otherwise impose a quota on any racial group. Instead, the efforts were directed to providing information to those felt less likely to consider housing in those suburbs and thus to promote integrated living.

5. These efforts also, to the extent that housing demand is increased as a result of such efforts, has a beneficial effect on the real estate business in general and homeowners and brokers in particular.

CONCLUSIONS OF LAW

COUNTS I and II

1. Counterplaintiffs are the GSSBR and NAR, the defendants to the complaint. Counterdefendants under Count I of the counterclaim are the SSHC and the Village of Park Forest. Counterdefendants under Count II of the counterclaim are the SSHC and nine municipalities (including Park Forest), all of which are located in the South Suburban area.

2. It is a fundamental national policy to promote stable, long-term racial diversity in the communities of the United States. As the Supreme Court repeatedly has said, " '[t]here can be no question about the importance' to a community of 'promoting stable, racially integrated housing.' " *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 111, 99 S.Ct. 1601, 1613, 60 L.Ed.2d 66 (1979), quoting *Linmark Assocs., Inc. v. Willingboro Twsp.*, 431 U.S. 85, 94, 98 S.Ct. 1614, 1619, 53 L.Ed.2d 155 (1977). The Seventh Cir-

cuit observed in the *Arlington Heights* decision: "[The Fair Housing] Act was intended to promote 'open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat.' " *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1289 (7th Cir.1977), *cert. denied* 434 U.S. 1025, 98 S.Ct. 752, 54 L.Ed.2d 772 (1978) (hereinafter referred to as *Arlington Heights II*), quoting *Otero v. NY City Housing Authority*, 484 F.2d 1122, 1134 (2d Cir.1973). The national commitment to the promotion of integrated housing has long been emphasized by the Supreme Court. *See*, e.g., *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 211, 93 S.Ct. 364, 368, 34 L.Ed.2d 415 (1972) (perpetuation of segregation can be as deleterious as purposefully discriminatory conduct in frustrating national commitment "to replace the ghettos 'by truly integrated and balanced living quarters' ".)

3. This national commitment requires special attention to the needs of an integrated community threatened with resegregation. As the Supreme Court said in *Gladstone*, 441 U.S. at 110, 99 S.Ct. at 1613, the "adverse consequences attendant upon a 'changing' neighborhood" are often "profound." These harms basically "flow from the realities of a racially segregated community" and include a reduction in homebuying demand, the diminishment of the tax base, a threat to the ability of the community to bear the costs of local government and to provide essential services and the loss of the positive benefits of living in an integrated community. *Id.* at 110-11, 99 S.Ct. at 1613-14.

4. The *types* of activities the SSHC engages in which counterplaintiffs challenge—Affirmative Marketing, Testing,

Counseling, and Realtor Training (counterclaim, ¶ 35)—are all *per se* lawful:

(a) *Affirmative Marketing.* For the reasons given affirmative marketing is a lawful activity. (See Conclusion No. 8, *infra*, p. 1087)

(b) *Testing.* The Court of Appeals for the Seventh Circuit has noted that courts "have repeatedly approved and sanctioned the role of 'testers' in racial discrimination cases," and "the evidence provided by testers is frequently valuable if not indispensable." *Richardson v. Howard*, 712 F.2d 319, 321 (7th Cir.1983).

(c) *Counseling/Assistance to Homeseekers.* Providing homeseekers with information about additional housing options, in particular options which would promote integration, is lawful for the same reason affirmative marketing is lawful—it does not deny or "otherwise make unavailable" any housing to anyone. *See*, also, the NAR's statements that "encouragement of integration . . . [is] consistent with the national housing policy." (PX52, p. 45; PX53, p. 15)

(d) *Realtor Training.* Patently it is not unlawful for a fair housing center to exercise its First Amendment rights to provide educational seminars for Realtors who choose to attend.

5. Thus the issue on the counterclaim with regard to the SSHC is not the Center's stated purpose of promoting integration, nor the types of programs it employs to pursue that purpose. Rather, the issue is whether the SSHC's specific implementation of its programs which counterplaintiffs call "integration maintenance" is in some respect unlawful. The court will examine counterplaintiffs' claims to this effect under the Fair Housing Act in Parts a and b below, and their claims under 42 U.S.C. §§ 1982 and 1983 in Parts c and d respectively.

a. *Fair Housing Claims—Effects Analysis*

6. A Fair Housing Act violation may be established by means of an "effects" analysis involving four factors:

(1) the effect of challenged conduct (whether it perpetuates segregation or has a greater adverse impact on one racial group than another);

(2) some evidence of discriminatory intent;

(3) the "interest" of the defendant in taking the challenged action; and

(4) the nature of the relief plaintiff seeks.

Arlington Heights, at 1290-93.

7. The alleged invidious effect of the SSHC programs "is to enforce [SSHC's] preferred population mix" or "quota" (counterclaim, ¶ 24), thus "restricting access to housing, with minority home buyers and renters shouldering most of the burden." *Id.*, ¶ 22. The court concludes that counterplaintiffs have failed to show any such effect of the SSHC's programs. As in *Steptoe v. Beverly Area Planning Assn.*, 674 F.Supp. 1313 (N.D.Ill.1987), the SSHC's activities do not "affect detrimentally the availability of housing" because they "do not deprive anyone of . . . housing information," but "served to increase, not decrease, the existing supply of housing information," and its "practice of fully informing homeseekers of its policy avoided the dangers inherent in the typical steering situation . . ." *Steptoe, supra*, at 1319, 1320.[6]

8. The main thrust of counterplaintiffs case was the assault against "affirmative marketing" adopted by coun-

[6] The court notes that the housing center in *Steptoe* helped only homeseekers interested in making non-traditional moves, *id.* at 1315, while the SSHC helps all homeseekers.

terdefendant, the SSHC, for use in the Apache Street AMP. (See Findings of Fact, Nos. 10 and 23, complt.) The court concludes that such affirmative marketing does not have the effect of a greater adverse impact on one racial group than another.

Since affirmative marketing does not contemplate the lessening of normal marketing activities designed to reach the racial group most likely to be attracted to the property in question, there is little adverse impact on the availability of the housing in question.[7]

Such measures are temporary in nature: to be used only in efforts to integrate segregated housing or to prevent resegregation of integrated housing. When integration occurs or the threat of resegregation abates affirmative marketing would no longer be necessary. There was no evidence submitted that affirmative marketing was being used to prevent integration or encourage resegregation; on the contrary, all of the evidence indicated that the opposite was the case.[8]

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[7] Except to the extent that wider marketing than normal would increase the number of people who would be aware of the availability of the property, increasing the likelihood that the property will be sold sooner or at a higher price. However since plaintiff's form of affirmative marketing works both ways, i.e., requires special marketing efforts to attract blacks to white areas and whites to black areas, the disparate impact is lessened if non-existent.

[8] *U.S. v. Starrett City Assocs.*, 840 F.2d 1096 (2nd Cir.1988), *cert. denied* ____ U.S. ____, 109 S.Ct. 376, 102 L.Ed.2d 365 (1988), does not require an opposite holding. The majority opinion said:

> "We do not intend to imply that race is always an inappropriate consideration under title VIII in efforts to promote integrated housing. We hold only that title VII does not allow appellants to use rigid quotas of indefinite duration to maintain a fixed level of integration . . ."

Id., p. 1103.

9. Counterplaintiffs' allegation respecting the second *Arlington Heights* factor of intent is that the SSHC's intent is to limit homeseekers' housing choices: "restrict[ ] access to housing", *id.*, ¶ 22; "manipulate the racial composition of the homeseeker traffic", *id.*, ¶ 24; "control the movement and distribution of minorities", *id.*, ¶ 33. The court concludes that counterplaintiffs have failed to prove those allegations. The activities of the SSHC are carefully designed not to modify "normal" homeseeking activities or limit anyone's housing choices.

10. The third *Arlington Heights* factor is counterdefendants' interest in taking the challenged action. Although the SSHC is a private entity, in taking the actions of which counterplaintiffs complain the SSHC is not "seeking to protect private rights", *Arlington Heights*, p. 1293, so as to render its interest inconsequential. Rather, the SSHC seeks to further what Congress and the courts have recognized as an important national goal of promoting stable, racially integrated housing. Many SSHC programs are undertaken in cooperation with or at the behest of government bodies. Thus the SSHC's activities are infused with a strong public interest that should be accorded considerable weight. Under the circumstances, the third *Arlington Heights* factor also weighs the SSHC's favor.

11. The fourth *Arlington Heights* factor, the nature of the relief plaintiff seeks, was posed in terms of whether the plaintiff sought to "compel the defendant to . . . take affirmative steps to ensure that integrated housing is built," rather than merely "to enjoin the defendant from interfering with that construction." *Arlington Heights*, at 1293. The underlying principle was a desire to avoid "a massive judicial intrusion on private autonomy." *Id.*

Here counterplaintiffs seek relief that goes far beyond enjoining the SSHC from "interfering" with a particular construction project. They ask the court to permanently enjoin virtually all of the SSHC's programs, including but not limited to affirmative marketing, testing, counseling and Realtor training. (Counterclaim, ¶ 35, p. 14) This would be "a massive judicial intrusion" on SSHC autonomy. Moreover, such intrusion would shut down efforts to promote integration—precisely the kind of efforts that *Arlington Heights* decision was designed to protect.

Therefore the court concludes that the fourth *Arlington Heights* factor weighs in favor of the SSHC.

12. In this case, since all four *Arlington Heights* factors support the SSHC, the court concludes that counterplaintiffs have failed to prove an "effects" case under the Fair Housing Act.

b. *Fair Housing Claim—Intent Analysis*

13. To establish an "intent" case counterplaintiffs must prove that the SSHC denied or made housing unavailable to a person or persons because of race, or otherwise "directly" and "detrimentally" affected the availability of housing because of race. *Steptoe, supra* at 1319; *Phillips v. Hunter Trails Comm. Assn.*, 685 F.2d 184, 199 (7th Cir.1982).

Since counterplaintiffs offered no evidence respecting any persons who sought to purchase or rent homes and who were denied that right by the SSHC, or that the SSHC denied or made housing available to anyone, or in any way restricted or limited anyone's housing choice, the court concludes that counterplaintiffs have failed to prove an "intent" case under the Fair Housing Act.

c. *Section 1982 Claim*

14. Section 1982 provides:

> "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey any real and personal property."

42 U.S.C. § 1982. "[I]n sharp contrast to" the Fair Housing Act, "42 USC § 1982 is not a comprehensive open housing law," *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413, 88 S.Ct. 2186, 2189, 20 L.Ed.2d 1189 (1968), but is "limited on its face to discrimination with respect to property rights." *Krieger v. Republic Van Lines*, 435 F. Supp. 335, 338 (S.C.Tex.1977), citing *Jones*.

Moreover, the property right at issue in a Section 1982 claim must (except in extraordinary circumstances not present in the instant case) be the plaintiff's *own* property right. *Mackey v. Nationwide Ins. Companies*, 724 F.2d 419, 421-22 (4th Cir.1984); *Wilkey v. Pyramid Const. Co.*, 619 F.Supp. 1453, 1455-57 (D.C.Conn.1985).

In addition, "an essential element" of a Section 1982 claim is a showing of "intentional racial discrimination," *Phillips v. Hunter Trails Comm. Assn.*, *supra*, 685 F.2d at 187, seemingly more stringent than the "intent" showing required under the Fair Housing Act. *See, Jones v. Alfred H. Mayer Co.*, *supra*, 392 U.S. at 421-22, 88 S.Ct. at 2193-94 (indicating that a showing of racial animus is required under Section 1982.)

15. The NAR and the GSSBR have failed to establish these "essential elements" of a Section 1982 claim. First, there was no evidence establishing that any person's property rights have been infringed by the SSHC's activities. *See, Steptoe*, *supra* at 1322-23 (housing center "in no way could have impaired . . . property interests" because

homeseekers could obtain any "necessary housing information from traditional commercial channels.")

Second, the NAR and the GSSBR have failed to assert or prove that their *own* property rights have been infringed by the SSHC. No right of the NAR or the GSSBR to purchase, sell or lease property has been referred to.

Finally, there is no evidence in the record that the SSHC engaged in "intentional racial discrimination" of the type deemed essential in *Jones*.

Accordingly, the court concludes counterplaintiffs have failed to establish their Section 1982 claim.

d. *Section 1983 Claim*

16. Section 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

42 U.S.C. § 1983. In order to prevail in a Section 1983 claim against the SSHC, counterplaintiffs must show that acting "under color of" state law the SSHC deprived them of rights secured by the Constitution or federal law. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150, 90 S.Ct. 1598, 1604, 26 L.Ed.2d 142 (1970).

17. In order to establish a violation of Section 1983 counterplaintiffs must also establish that the challenged conduct deprived counterplaintiffs of a right secured by

the Constitution or laws of the United States. Counterplaintiffs have not proved that the SSHC deprived any person of statutory rights. Thus it remains only to consider the possibility of deprivation of a constitutional right.

18. The only constitutional claim apparently raised in Counts I and II of the counterclaim is an equal protection claim. Counterplaintiffs allege that counterdefendants' programs "have the purpose and effect of restricting access to housing, with minority home buyers and renters shouldering most of the burden." (Counterclaim, ¶ 22)

19. Counterplaintiffs clearly have no standing to assert this claim. An equal protection claim would clearly rest on legal rights of minority homebuyers rather than those of homesellers. *Warth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 2205; *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100, 99 S.Ct. 1601, 1608. In addition, counterplaintiffs' programs do not restrict access to housing on account of race. (Conclusions of Law, No. 7, *supra*, p. 1087).

20. The court concludes that counterplaintiffs have failed to establish their Section 1983 claim.

FINDINGS OF FACT

COUNT III

"For Sale" Signs

1. Hazel Crest bans the use of real estate "for sale" signs. This ban was enacted as a result of expressions of concern from resident about the community. (Tr.6412-21)

2. University Park repealed its sign ban after trial commenced, replacing the ban with an ordinance that allows one "for sale" sign in a home's window. (DX326,

§ 1272.07(a)(2); DX472) Its declared purpose is "to protect the aesthetically pleasing qualities of the village as a wooded, suburban-rural, and visually open area" and to apply the non-illuminated real estate signs in a residential district that serves as a similar standard as that applicable to political signs. (DX472)

3. Glenwood repealed its sign ban on the eve of trial, replacing it with an ordinance that permits the imposition of limited bans only in specified circumstances. (MX190; DX133, Tr.3319-22)

4. Country Club Hills restricts the use of "for sale" signs in two different ways: first, by regulating the placement and size of these signs, and second, by imposing a fee and permit requirement that applies only to "for sale" signs. (MX11; MX598) In addition, the city has a voluntary sign restraint program designed to "stop some of the [homeseeking] traffic that we have on ride throughs." (DX 479, p. 6; *see* ¶¶ 179-80, *infra*) The declared purpose was "to preserve the proper character of the residential zoning district" and "to regulate the intrusion of commercial signage within residential zoning."

5. Country Club Hills restricts the use of real estate signs to the placement of one sign no larger than three square feet from the house on each property. (MX11) In addition, the city's regulations require that the sign be placed parallel to the front of the house. *Id.*

6. Matteson and Park Forest also regulate the use of "for sale" signs differently from other signs. (DX282; DX290) In Matteson residential real estate signs are limited to a size of eight square feet and five feet in height. In addition, there can only be one such sign on each lot and it must be within fifteen feet of the building. (DX290, p. 112) Its purposes include protecting aesthetic values

and ensuring compatibility with the environment. (DC290) In Park Forest real estate signs are limited to one sign of five square feet or less, including the frame or post, per lot. (DX282, pp. 2-4) Its declared purpose is "to facilitate an easy and pleasant communication between people and their environment by the use of signs which are consistent and harmonious with their environment and the concept of this village as primarily a residential planned community. (Park Forest Code, §§ 31-145)

7. "For sale" signs are a cost effective and valuable form of advertising which benefits homesellers, who get exposure for little cost; homeseekers, for whom signs may be a direct source of information about the availability of homes; and brokers, for whom signs provide a source of sales and a measure to good will advertising. (Tr.2507-58; 2612-13; 3822-23)

8. Assuming that a sign ban, as opposed to regulations might ever be valid, the court finds that Hazel Crest did not meet the extremely difficult burden of proving imminent threat of "sudden and wrenching change" in the community, substantial panic selling; that such a ban would be necessary or effective.

9. The court found little evidence that the sign regulations resulted in measurable lost income for realtors, that the regulations had a discriminatory impact on black homeseekers, or that they denied access to housing to anyone. Therefore the court finds the sign regulations, as opposed to the outright ban of Hazel Crest, are modest and reasonable.

10. A proliferation of "for sale" signs is widely perceived to be destabilizing to an integrated community. (Tr.6942-46) The court therefore finds it reasonable for a municipality to minimize the appearances of "for sale"

sign proliferation so that the community has an opportunity to present the counter message that panic avoidances can lead to a stable integrated community.

CONCLUSIONS OF LAW

a. *Fair Housing Act*

1. Counterplaintiffs' Fair Housing Act challenge to "for sale" sign ordinances (Count III) fails. Hazel Crest prohibits the use of residential "for sale" signs. Country Club Hills, Matteson, Park Forest and University Park merely regulate the time, place and manner of their use.

2. Counterplaintiffs failed to make any credible showing that the "for sale" sign ordinances made housing unavailable to any person because of race and their Fair Housing Act claim fails on that basis alone. Nor did counterplaintiffs establish that the municipalities enacted or administered these ordinances with discriminatory intent. The purposes underlying the Hazel Crest ordinance—the promotion of a stable, racially integrated community—and the purpose of the sign regulations of the other challenged counterdefendants—community aesthetics—clearly are not discriminatory. All of these ordinances are racially neutral and counterplaintiffs adduced no substantial evidence that the stated purposes of the legislation were in any way contrived or pretextual. Nor did counterplaintiffs make a sufficient showing of discriminatory effect or disparate impact under the *Arlington Heights II* standard. 558 F.2d at 1290-93.

3. *First Factor.* Counterplaintiffs failed to demonstrate that the "for sale" sign ban or size and placement ordinances have a racially discriminatory effect or a disparate impact. Very few homeseekers of any race find the house they eventually purchase by viewing "for sale" signs and

the evidence suggests that black homeseekers rely overwhelmingly on real estate agents, rather than signs, to locate properties. Counterplaintiffs have not shown that the effect of the "for sale" sign ordinances is to perpetuate segregation—the other cognizable discriminatory effect recognized in *Arlington Heights II*, 558 F.2d at 1290.

4. *Second factor.* As discussed above, no showing of discriminatory intent has been made with respect to the "for sale" sign ordinances. This element of the *Arlington Heights II* test therefore also weighs against a finding of liability.

5. *Third Factor.* The interest of Hazel Crest in enacting its "for sale" sign ordinance—the promotion of stable, racially integrated neighborhoods—has long been recognized as a significant and legitimate governmental interest. *See*, e.g., *Trafficante*, 409 U.S. at 211, 93 S.Ct. at 367; *Gladstone*, 441 U.S. at 111, 99 S.Ct. at 1613. Nor can there be any question that the interest in community aesthetics of four municipal counterdefendants is also a substantial and legitimate governmental purpose. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-08, 101 S.Ct. 2882, 2892-93, 69 L.Ed.2d 800 (1981) (White, J., plurality).

Accordingly, this factor also cuts against any Fair Housing Act liability.

6. Counterplaintiffs have therefore failed to establish their Fair Housing Act challenge to the "for sale" sign ordinances.

b. *Constitutional Challenge*

7. Count III of the counterclaim challenges the "for sale" sign bans and ordinances of the municipal counter-

defendants as violative of the First Amendment and Article I, Section 4 of the Illinois Constitution. The issue is limited here; only Hazel Crest bans the use of residential "for sale" signs. (MX101) However, Country Club Hills, Matteson, Park Forest and University Park regulate the size, placement and number of such signs and counterplaintiffs have challenged those regulations too.

8. The Supreme Court has already struck down a sign ban virtually identical to that of Hazel Crest. In *Linmark Assocs., Inc. v. Willingboro*, 431 U.S. 85, 87-88, 97 S.Ct. 1614, 1615-16, 52 L.Ed.2d 155 (1977), an unanimous Supreme Court held that a municipal ordinance banning "for sale" signs violated the First Amendment.

9. The circumstances in *Linmark* were strikingly similar to the facts here. Willingboro was a predominantly white community throughout its early history. By 1970 it had achieved some measure of integration, with a black population of approximately 11.7 percent. By 1973 the black population had risen to 18.2 percent, and Willingboro sought to control the racial change that appeared to be taking place. One of the township's chosen methods was a "for sale" sign ban. *Id.* at 87-88, 97 S.Ct. at 1615-16.

10. Accepting Hazel Crest's contention that a sign ban might be legal under certain rare circumstances, the evidence falls short of demonstrating that the ban is necessary to assure that Hazel Crest remains an integrated community. *Linmark*, 431 U.S. at 95, 97 S.Ct. at 1619. (*See*, Findings of Fact No. 8, *supra*, p. 1090) First, Hazel Crest has offered no evidence that substantial "panic selling" was occurring in the community at all, much less as a result of "for sale" signs. *Id.* In *Linmark*, by contrast, various witnesses testified that real estate signs were a major cause of the "panic selling" that was occurring. *Id.* at 87-88, 97 S.Ct. at 1615-16.

11. Second, Hazel Crest made no showing that the sign ban reduced public awareness of home sales and thereby decreased public concern. *Id.* at 96, 97 S.Ct. at 1620. In *Linmark* the court noted that the sales volume was unchanged after the ban was enacted and concluded that the ban had little impact on the public's concerns. Indeed the court suggested that a ban might actually "fuel public anxiety by increasing homeowners' dependence on rumor and surmise." *Id.* at 96 n. 10, 97 S.Ct. at 602 n. 10.

12. Third, Hazel Crest has not demonstrated that an emergency existed in the community that precluded dispelling public concern over any asserted panic selling through education and the dissemination of additional information. *See, City of Chicago v. Prus,* 117 Ill.App.3d 455, 72 Ill.Dec. 901, 916, 453 N.E.2d 776, 791 (1983). In fact Hazel Crest admits that no areas of the village have ever undergone rapid racial change, contending only that such turnover *could* develop in the future. Such evidence is plainly insufficient to uphold a sign ban. *See, Linmark,* 431 U.S. at 85, 97 S.Ct. at 1615 ("only an emergency can justify repression"); *Prus,* 72 Ill.Dec. at 916, 453 N.E.2d at 791 (necessary to show a "sudden, wrenching change.")

13. Accordingly, the Hazel Crest sign ban violates the First Amendment. Moreover, since the free speech protections of the Illinois Constitution are even broader than those afforded by the United States Constitution, Hazel Crest's ordinance also violates Article I, Section 4 of the Illinois Constitution. *See, Blue Island v. Kozul,* 379 Ill. 511, 41 N.E.2d 515, 520 (1942).

14. The First Amendment tolerates reasonable time, place or manner restrictions of speech such as those of Country Club Hills, Matteson, Park Forest and University Park. *Clark v. Community for Creative Non-Violence,*

468 U.S. 288, 293, 104 S.Ct. 3065, 3068-69, 82 L.Ed.2d 221 (1984). Such restrictions are valid "provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Id.* at 294, 104 S.Ct. at 3069.

15. The "for sale" sign size, placement and manner restrictions contained in the ordinances of Country Club Hills, Matteson, Park Forest and University Park merely regulate but do not prohibit signs. Consequently the time, place and manner standard of *Clark* and therefore the First Amendment is not violated.

16. The "for sale" sign regulations of Country Club Hills, Matteson, Park Forest and University Park also pass the *Clark* constitutional test because they are justified without reference to the content of the regulated speech, they are narrowly tailored to serve a significant governmental interest and they leave open ample alternative channels for communication of the information. *Clark*, 468 U.S. at 294, 104 S.Ct. at 3069.

FINDINGS OF FACT

COUNT IV

Anti-Solicitation Ordinances

1. The municipalities also employ anti-solicitation ordinances in their integration maintenance programs. (MX2; MX4; MX101-02; MX187-88; MX271; MX248; MX382) The ordinances of Country Club Hills, Glenwood, Hazel Crest and Matteson are virtually identical and provide:

"No real estate agent shall solicit any owner or occupant of a dwelling *to sell or rent, or list for sale or rental,* such dwelling at any time after such owner or occupant has notified the [Municipality] that he does not desire to be so solicited.

* * * * * *

"The [Municipality] shall prepare a list of names and addresses of such owners and occupants and shall publish the same as follows:

* * * * * *

(B) By mailing or otherwise delivering a copy of said list annually, to every real estate firm belonging to the local board of realtors . . ."

2. These ordinances define "solicit" or "solicitation" as:

"[A]ny communication by or on behalf of a real estate agent with the owner or occupant of a dwelling (i) which is *intended to induce* the sale, rental or listing for sale or rental of such dwelling; (ii) which is intended to offer or promote services in connection with the sale, rental or listing of such dwelling; and (iii) which is carried out by means of:

(a) in-person contacts at the dwelling;

(b) written material mailed or delivered directly to the dwelling, such as direct mail, leaflets or pamphlets; or

(c) telephonic contacts with owners or occupants of the dwelling.

"For purposes of this Ordinance the term "solicit" or "solicitation" shall not refer to communications carried out by means of print or electronic media of general circulation, such as newspaper, radio, television or the yellow pages."

3. Park Forest defines solicitation as "any conduct (excluding advertisements in newspapers, magazines or broadcast media of general circulation) designed or intended to

induce the owner of real property . . . to sell, rent, exchange, convey, transfer or list for sale or rental such real property." (MX832, § 24-½-1)

4. Violations of the anti-solicitation ordinances in each of the municipalities except Park Forest are punishable by fines of up to $500. (MX4, § 19.11.01; MX187, §§ 29-39; MX101, §§ 14-57; MX271, § 32.124) Park Forest leaves the nature of its penalty to the discretion of its Village Board. (MX382, § 24-½-25(k))

5. Indeed counterdefendants' witnesses testified that the anti-solicitation ordinances are based on the desire to protect residents from exposure to advertising because this information might cause homeowners to question the racial stability of their communities or re-evaluate their decisions to live there. (Tr.3059; 5255; 6133-35; 6398; 7001) As with "for sale" sign bans, the ordinances are designed to keep residents from moving, to maintain the status quo and to reduce the ability of homeseekers to find homes in the municipalities. (Tr.2082-83; 4459-61)

6. Nevertheless each municipality chose to arrange the list alphabetically by the surnames of residents—not by street name. (DX 195; DX449A; Tr. 3079-80; 6634-35) Compiling the lists in this fashion makes it more difficult for real estate brokers to use directories that are arranged by street name which is a common *modus operandi*. (DX 195, p. 2) Hazel Crest refused a specific request that its list be arranged alphabetically by street address. (Tr. 3747-51)

7. The municipalities' arrangement of the list increased the cost and burden of compliance with the anti-solicitation ordinances and exacerbated the risk of inadvertent violation. (Tr. 3083-85; 4740-42) Because of these risks some brokers have chosen not to solicit, prospect, or farm in

anti-solicitation villages. (Tr. 2601-08; 4728-29; 4734-35; 58782-73)

8. Although it is somewhat more costly to arrange solicitation lists by street, this burden is not sufficient to justify the added burden to the realtors resulting by the failure to do so. (Tr. 3083-85, 4740-42) It appears however that all lists are now organized by street name as a result of pressure of the realtors. (Tr.3079-80; 5789-90; 6401-02; 6405; MX24; MX153; MX199; MX284)[9]

9. In response to the instant case, and the suits challenging Hazel Crest and Matteson's ordinances (Tr. 3809-10), the municipalities acted on the advice of their trial counsel and amended the definition of solicitation contained in their ordinances.[10] (Tr. 3170-73; 5388-90; 5598-5600; 6640-42; DX199; DX222-23; DX267) According to the municipalities this amendment did not cause any substantive change in the definition of solicitation other than to expressly exempt advertisements in general circulation media. (Tr. 6639-40)

10. Widespread solicitation by real estate brokers and salesmen, similar to the "for sale" sign proliferation, is widely perceived to be destablizing to an integrated community. (Tr. 6930-33) The anti-solicitation ordinances are designed to make solicitation more difficult and expensive.

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[9] Counterplaintiffs have filed a motion to reopen and supplement the record to show, *inter alia*, that Country Club Hills had jumbled its 1988 anti-solicitation list. It appears from the response that the list has now been unjumbled. Therefore the motion is denied.

[10] Park Forest did not have the same type of anti-solicitation ordinance as the other municipalities until November 25, 1985. When it enacted its ordinance a definition substantially similar to the one contained in the amendments was included.

11. Another purpose of the anti-solicitation ordinances is to provide a method for a resident to obtain a measure of privacy by avoiding annoying and intrusive inquiries about residential plans.

12. Matteson, Glenwood and Hazel Crest actively publicize the fact that they have an anti-solicitation ordinance; Country Club Hills and Park Forest do not. The result is that the antisolicitation lists of the former are larger than those of the latter. (DX136; DX196; DX201; DX205-06; DX226; DX264; DX272; DX275; MX421)

13. The effect of the anti-solicitation ordinances is greatly exacerbated by the uncertainty of the meaning of the term "solicitation." The counterdefendant municipalities interpret their ordinances to ban all business communication mailed or delivered by real estate brokers, even if their intended purpose was only to generate goodwill, such as holiday calendars, birthday greetings, the sales of investment or vacation property, or to find buyers or referrals.

CONCLUSIONS OF LAW

a. *Fair Housing Act Challenge*

1. The solicitation ordinances are not racially discriminatory, either in intent or in effect. First, the record is devoid of substantial evidence tending to show that the ordinances were intended to discriminate against blacks or any other racial group.

2. Similarly, there is no substantial evidence tending to show that the solicitation ordinances have had a racially discriminatory effect. The purpose of the ordinance is to bar from solicitation only those who request it. Therefore the only families barred from receiving solicitations are

precisely those who are least likely to offer their homes for sale anyway—families (black and white, newcomers and oldcomers) who have affirmatively indicated that they are not interested in moving or selling or listing their homes and do not want to be bothered by real estate salesmen looking for business. The solicitation ordinances are facially neutral and nondiscriminatory as to race and the evidence failed to establish that they are otherwise with regard to effect or result.

3. The foregoing conclusions are buttressed by an application of the *Arlington Heights II* test, 558 F.2d at 1290-93.

4. *First Factor.* Under either of the two species of discriminatory effect set forth in *Arlington Heights II*—disparate impact or furthering segregation—the showing of discriminatory effect here was nonexistent or extremely weak. As indicated above, there was no substantial showing that the solicitation ordinances have a disparate impact on blacks and, by the nature of such ordinances, such an impact is very unlikely.

5. *Second Factor.* Because the court finds that there is no evidence of discriminatory intent with regard to the solicitation ordinance, the second criterion of *Arlington Heights II* also cuts against any finding of liability.

6. *Third Factor.* The interests of counterdefendants in taking the limiting solicitation heavily weighs against a finding of liability. First, it is beyond doubt that the privacy and promotion of racial diversity purposes underlying the solicitation ordinances are significant and legitimate governmental interests. Furthermore, if "the defendant is a governmental body acting within the ambit of legitimately derived authority," it is "entitled to the deference which courts must pay to legitimate govern-

mental action" and the courts "will less readily find that [the] action violates the Fair Housing Act." *Arlington Heights II*, 558 F.2d at 1293. Here the municipal counterdefendants acted within their legitimately derived authority. There was no issue at trial as to the communities' right, pursuant to home rule authority or otherwise, to enact the solicitation ordinances. The claim has been that those ordinances violate federal law, not that they exceeded the lawmaking powers of the Illinois municipalities. Thus the solicitation ordinances and the other municipal enactments in this case deserve the deference of the court.

b. *First Amendment Challenge*

7. The communications sought to be prohibited by counter-defendants' anti-solicitation ordinances constitute commercial speech and they are entitled to "qualified" but nevertheless "substantial" protection by the First Amendment. *Bolger v. Youngs Drug Prdts. Corp.*, 463 U.S. 60, 103 S.Ct. 2875, 2881, 77 L.Ed.2d 469 (1983).

Central Hudson Gas & Electric Corp. v. Public Service, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), established a four-part analysis for asserting the validity of commercial speech.

1) Whether the expression is constitutionally protected;
2) Whether the governmental interest is substantial;
3) Whether the regulation advances the government interest asserted; and
4) Whether it is more extensive than necessary to serve that interest.

8. Under the *Central Hudson* analysis, the anti-solicitation ordinances are unconstitutional as applied to some of counter-defendants' mailings.

The ordinances apply to virtually all mailings of Realtors without regard to being false, deceptive or misleading. Although the government has an interest in protecting the privacy of its citizens who desire such protection and although the government has an interest in promoting the appearance of racial stability and avoiding fears of blockbusting and racial unrest, and preventing mailings from Realtors certainly advances these interests, nevertheless the effect of banning all communication by mail from Realtors is far more extensive than necessary.

The effect of the ordinances as interpreted and enforced by counterdefendants is to prohibit the mailing of mere promotional material from Realtors. The interests claimed by counter-defendants clearly could be met by a much less restrictive ordinance: the banning of solicitations actually seeking to induce the sale, rental or listing of a dwelling would be sufficient to meet the proferred needs of counterdefendants. It is hard to see how communicating the existence of a particular Realtor to a citizen of a community can be detrimental to racial stability of a community.

Frisby v. Schultz, ____ U.S. ____, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988), does not compel a different result. In *Frisby* the Supreme Court upheld an ordinance that barred picketing focused on a single home. In so doing the court focused on the fact that the picketing ban was narrowly tailored to protect the home occupier from a form of message that was particularly "offensive and disturbing." The vice in the ordinances of counterdefendants is that it bans virtually all communications from realtors regardless of content in order to save residents from receiving solicitations to buy their homes. It is not narrowly tailored to effect this purpose because it bans communications, innocent as well as offensive.

9. The ordinances also fail to satisfy due process. The ordinances must be sufficiently explicit to inform those who are subject to them of what conduct is prohibited. *See, Bouie v. Columbia*, 378 U.S. 347, 352, 84 S.Ct. 1697, 1701, 12 L.Ed.2d 894 (1964); *Connally v. General Const. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed.2d 322 (1926). This vagueness test is particularly stringent in cases where as here the laws in question impinge on constitutionally protected conduct. *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620, 96 S.Ct. 1755, 1760, 48 L.Ed.2d 243 (1976).

10. The ordinances define solicitation as any communication "intended to induce the sale, rental or listing" of a dwelling. This definition could be interpreted (and is by counter-defendants) to include virtually anything, such as an exchange of business cards, a friendly chat while showing homes in a neighborhood, introducing new neighbors, or the announcement of the opening of a new office. Therefore the ordinances are unconstitutionally vague on their face. *See, Illinois Ass'n of Realtors v. Village of Bellwood*, 516 F.Supp. 1067, 1075 (N.D.Ill.1981).

11. A substantial question exists as to whether the ordinances cover "indirect" solicitations. The trial testimony showed that by lumping "solicitation" with "advertisement" the municipalities rendered the definition of solicitation hopelessly vague. *See, Coldwell Banker Res. Real Estate v. Clayton*, 105 Ill.2d 389, 86 Ill.Dec. 322, 325, 475 N.E.2d 536, 539 (1985) (statutes should be given their "plain and ordinary meaning.") "Solicitation" means to move to action, to endeavor to obtain by urgent request and implies personal petition to a particular person to do a particular thing (Webster's New Collegiate Dictionary 106 (4th Ed.1977); Black's Law Dictionary 1248-49 (5th Ed. 1979), while "advertising" is the calling of information to

the attention of the public by whatever means (Webster's at 18; Black's at 50).

12. Just before trial the municipalities distributed a letter stating that they believe *every* "business communication" from a real estate broker is a solicitation to list or sell—despite the ordinances' requirement that a communication must be *intended to induce a sale or listing for sale.* The text of the ordinances provide insufficient warning that "indirect" solicitation is prohibited and thus they are unconstitutionally vague.

FINDINGS OF FACT

COUNT V

Data Reporting

1. At the time the NAR and the Board filed their counterclaim in this action, Matteson and Glenwood each had ordinances requiring real estate brokers to report to the villages, *inter alia*, the name, address, telephone number and race of all prospects to whom they had shown properties, the locations of the homes shown to those individuals, the location of homes the prospects offered to purchase, and the address of the home if they ultimately bought. (MX187, Art. V; MX271, Art. V) Each of these ordinances was based on a prototype prepared by the BPI for all of the FHLAC communities. (Tr. 3388-89; DX307)

2. None of the other municipalities has ever enacted a data collection ordinance mandating that brokers provide this information. (Tr. 5162; 6701) To the extent these other villages collect housing data they do so by means of voluntary entrance interview questionnaires distributed to new residents when they sign up for water service. (Tr. 5023-25; 6237-30; 6511)

3. Shortly before trial began both Glenwood and Matteson amended their data collection ordinances on advice of counsel. (MX189; MX275; MX277; DX105) The amendments provided that real estate brokers could omit the names, addresses and phone numbers of their prospects from their reports to the village if they agreed to maintain that data and make it available upon request. Brokers thereafter had the option to provide data only about the race of homeseekers and properties shown in their monthly reports. (MX189, § 11-½-50(d); MX277; § 32.01(C))

CONCLUSIONS OF LAW

COUNT V

a. *Fair Housing Challenge*

1. Although Count V is directed against all the municipal counterdefendants, only Glenwood and Matteson have data reporting ordinances. (MX189, 277) Consequently Count V applies only to those two counterdefendants.

2. Counterplaintiffs claim that the data reporting ordinances of Glenwood and Matteson violate the Fair Housing Act. However there was no evidence that those ordinances ever made housing unavailable to any person on account of race. For that reason alone counterplaintiffs have failed to establish a Fair Housing Act violation.

3. The data collection ordinances require the reporting of homeseeking data for both black and white homeseekers. The information is carefully safeguarded, proper use is defined and the ordinances provide for quasi-criminal penalties for a violation of confidentiality or misuse of the information. No discriminatory purpose or intent underlies these ordinances. In fact they provide information which contributes to the identification of discriminatory real

estate practices so that proper action may be taken. Counterplaintiffs failed to show a single instance when the information was used for any other purpose or was in any way misused. Racial housing information is gathered routinely by other organizations for legitimate purposes. It is a regular part of the United States Census data and the NAR (as part of its VAMA) strongly urges local boards and Realtors to collect and maintain data on the race of homeseekers served. Counterplaintiffs did not establish discriminatory intent, *Phillips*, 685 F.2d at 190, or prove that these ordinances had a discriminatory effect or disparate impact on minorities. *Arlington Heights II*, 558 F.2d 1293-94. Therefore their Fair Housing claim fails.

b. *Constitutional Challenge*

4. Counterplaintiffs assert in Count V that the data reporting ordinances of the municipal counterdefendants stigmatize racial minorities and violate their right to privacy. They also contend that these ordinances violate counterplaintiffs' and their members' right to equal protection and due process and chill their right to free speech. At trial counterplaintiffs failed to substantiate any of these purported effects to third parties, themselves or their members.

Accordingly, the constitutional challenges against the data reporting ordinances fall.

5. The claim of stigmatic injury would fail because the data reporting ordinances are race-neutral and counterplaintiffs have failed to introduce any evidence of discriminatory intent underlying those provisions. *Arlington Heights I*, 429 U.S. at 266, 97 S.Ct. at 564.

6. Counterplaintiffs' assertion that the data reporting ordinances violate minorities' right to privacy is also without merit. First, no one at trial contended that the governmental collection of racial data in and of itself is an invasion of privacy or otherwise wrongful conduct. The Census Bureau as well as the Realtors themselves collect racial data. Courts routinely approve the collection and reporting of racial data. *See*, e.g., *Caulfield v. Bd. of Ed.*, 583 F.2d 605, 611-12 (2nd Cir.1978) (Constitution does not condemn the collection of racial data); *U.S. v. New Hampshire*, 539 F.2d 277, 280-82 (1st Cir.1976), *cert. denied* 429 U.S. 1023, 97 S.Ct. 641, 60 L.Ed.2d 625 (1976) (requirement that state provide racial and ethnic data to federal government is constitutional); *Safeway Stores, Inc. v. NLRB*, 691 F.2d 953, 957 (10th Cir.1982); *Cf. Whalen v. Roe*, 429 U.S. 589, 605-06, 97 S.Ct. 869, 879-80, 51 L. Ed.2d 64 (1977) (collection and maintenance of data regarding the names and addresses of persons who obtained certain prescription drugs not an invasion of privacy.) The issue rather is the use to which the data is put and the precautions taken to ensure confidentiality.

7. There was no credible evidence at trial that the purposes for which the data are used are improper. Indeed, the evidence was to the contrary, for even as counterplaintiffs' own witness acknowledged, the collection of data to identify disparate impact housing practices and to dispel harmful rumors is useful and proper.

8. Furthermore, the confidentiality precautions undertaken by Glenwood and Matteson prevent any privacy breach against the rights of blacks or anyone else. The ordinances mandate strict confidentiality in the use of the data, precisely define and limit access to the information, and impose substantial penalties for violations. (MX189, § 11-½-53; 277, § 32.015) Glenwood and Matteson village

officials review and analyze the data only in its aggregate form. Besides, the reporting of the identity of homeseekers is not required at all so the opportunities for misuse of information are minimized. The ordinances are carefully structured to ensure that invasions of privacy do not occur; and there was no evidence at trial that any ever have. *See, Whalen*, 429 U.S. at 601, 97 S.Ct. at 877 (no violation to right of privacy where security provisions prevent improper disclosure and access to private data.)

9. As to counterplaintiffs, the data collection ordinances are a type of economic regulation and their equal protection and due process claims, accordingly, are subject to the minimum scrutiny rational basis. *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 82-84, 98 S.Ct. 2620, 2635-36, 57 L.Ed.2d 595 (1978) (rationality test of state economic regulation applies equally to substantive due process and equal protection claims); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 124-25, 98 S.Ct. 2207, 2213, 57 L.Ed.2d 91, *reh'g denied* 439 U.S. 884, 99 S.Ct. 232, 233, 58 L.Ed.2d 200 (1978). Under that standard "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is reasonably related to a legitimate state interest." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985).

10. The municipalities' interests in data collection—identifying discriminatory practices and dispelling unfounded rumors—clearly are legitimate governmental purposes. Obtaining homeseeker information from Realtors enables the municipalities to monitor compliance with their fair housing ordinances and surely is rationally related to the foregoing purposes. Furthermore, counterplaintiffs failed to offer any credible evidence that these ordinances present any burden to their members, not to mention an unrea-

sonable one. Counterplaintiffs' equal protection and due process challenges therefore fail.

11. Finally, the claim that the data reporting ordinances chill the free speech of counterplaintiffs and their members is unavailing. There was no evidence whatsoever that the data reporting ordinances in any way chilled or even affected counterplaintiffs' or their members' rights to free speech.

FINDINGS OF FACT

COUNT VI

Treatment of Government and Non-Profit Activities

1. In Count VI, counterplaintiffs allege that the municipalities permit governments and not-for-profit organizations to engage in discriminatory activities by excluding these entities from the scope of the Model Ordinances and by proscribing certain real estate practices only if they are performed for profit. (Counterclaim, ¶¶ 79-80) As the court finds below, there is no evidence to suggest a discriminatory purpose or effect as a result of these provisions.

2. The rationale and specific explanation for the challenged provisions is included in the BPI commentary provided to each municipality enacting the Model Ordinance. (*See*, e.g., MX267 at 4-8, 12-13) The "special outreach" proviso is based upon and specifically authorized by the Illinois Human Rights Act and the Illinois Municipal Code, Ill.Rev.Stat., ch. 68, § 7-108(D); ch. 24, ¶ 11-11.1-1 (1985), and is consistent with HUD regulations and practices. (*See*, MX267 at 4-8) Special outreach must be "by or under the authority of" units or local government or non-

profit fair housing agencies to ensure that any such efforts by real estate firms are conducted in compliance with federal, state and local fair housing law. *Id.*

3. Counterplaintiffs' challenge is apparently directed at two provisions of the fair housing ordinances based upon the Model Ordinance. The first is the provision that exempts from the definition of discrimination:

> "Special outreach efforts conducted by or under the authority of units of local government . . . or nonprofit fair housing agencies to ensure that persons of minority groups are fully informed of available dwelling opportunities in areas of present or prospective majority group concentration, or to ensure that persons of the majority group are fully informed of available dwelling opportunities in areas of present or prospective minority group concentration."

(MX4, § 19.2.01; MX101, §§ 14-27; MX187, § 28-4; MX271, § 32.83) The second provision makes it a prohibited act to:

> "For profit, induce or attempt to induce the sale, rental or listing for sale or rental of any dwelling by representations regarding the presence in, proximity to, or entry or prospective entry into, the block, neighborhood or area of a person or persons of a particular race, color, religion, sex, or national origin."

(MX4, § 19.4.01(H); MX101, § 14-29(H); MX187, § 18-13; MX271, § 32.92)

4. The "for profit" panic peddling prohibition is derived from and parallels the Fair Housing Act itself. *Id.* at 10-14.

5. In essence, the court finds that the municipalities have enacted the challenged special outreach and panic peddling provisions for the purpose of following analogous state and federal statutes and not for any invidious or discriminatory purpose. Furthermore, the court finds no

evidence to suggest that non-profit agencies, like the SSHC, or the municipalities have engaged in panic peddling or any other discriminatory conduct allegedly permitted by the wording of the challenged provisions. Accordingly, the court finds no factual basis to support this last claim of counterplaintiffs.

CONCLUSIONS OF LAW

COUNT VI

a. *Fair Housing Preemption Claim*

1. Section 3615 of the Fair Housing Act provides that "any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid." 42 U.S.C. § 3615. Counterplaintiffs contend that municipal counterdefendants' fair housing ordinances violate that provision because they permit steering or other race-conscious activity when performed by government or not-for-profit entities and therefore they are preempted. (Count VI)

2. However state or local legislation will be preempted only if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed.2d 581 (1941). The preeminence of federal law will be determined from the dominance of the federal interest as stated in the Constitution, *id.* at 62, 61 S.Ct. at 401, or if the regulation is "intertwined with the responsibilities of the national government," *id.* at 66, 61 S.Ct. at 403. The mere fact that Congress has legislated in a particular field "cannot mean . . . that every federal statute ousts all related state law." *Hillsborough Cty. v. Automated Medical Labs., Inc.*, 471 U.S. 707, 719, 105

S.Ct. 2371, 2378, 85 L.Ed.2d 714 (1985). Counterplaintiffs have failed to introduce evidence which satisfies either branch of the *Hines* doctrine. Absent such a showing counterdefendants' outreach efforts cannot be considered an obstacle to the goals of the Fair Housing Act; consequently the ordinances are not preempted.

3. Special outreach efforts which further and promote racial integration and diversity are not now and never have been a "discriminatory housing practice" under the Fair Housing Act. Indeed, the promotion of integrated housing and neighborhoods is one of the primary goals of the Act; *Trafficante*, 409 U.S. at 211, 93 S.Ct. at 367; *Gladstone*, 441 U.S. at 111, 99 S.Ct. at 1613; *Arlington Heights II*, 558 F.2d at 1289; *Barrick Realty, Inc. v. City of Gary, Ind.*, 491 F.2d 161, 164-65 (7th Cir.1974).

4. Nor is the prohibition of panic peddling "for profit" in the Model Ordinances adopted by Country Club Hills, Hazel Crest and Matteson offensive to the Fair Housing Act. Indeed, the Model Ordinances parallel the language of Section 3604(e) of the Fair Housing Act by stating:

> "PROHIBITED ACTS
>
> Panic Peddling.
>
> For profit, induce or attempt to induce the sale, rental or listing for sale or rental of any dwelling by representations regarding the presence in, proximity to, or entry or prospective entry into, the block, neighborhood or area of a person or persons of a particular race, color, religion, sex, or national origin."

(MX 271, § 39.92)

5. The Fair Housing Act acknowledges that certain conduct, such as panic peddling, is indigenous to, and particularly egregious in, a commercial setting. *See, U.S. v. Bob Lawrence Realty, Inc.*, 474 F.2d 115, 122 (5th Cir.),

cert. denied 414 U.S. 826, 94 S.Ct. 131, 38 L.Ed.2d 59 (1973) (" '[T]he words "for profit"] . . . were evidently included in § 3604(e) to distinguish and eliminate from the operation of that subsection statements made in social, political or other contexts, as distinguished from a commercial context, where the person making the representations hopes to obtain some financial gain as a result of the representations.' ") (quoting *U.S. v. Mintzes*, 304 F. Supp. 1305, 1312 (D.Md.1969)).

b. *Constitutional Challenge*

6. Counterplaintiffs contend that their rights to equal protection are violated by the distinction in the Model Ordinance communities' fair housing ordinances which permit governmental bodies and non-profit housing centers to engage in special outreach efforts, while such conduct is not permitted for the counterplaintiffs. This distinction does not violate counterplaintiffs' right to equal protection.

7. The standard of review for counterplaintiffs' equal protection claim is the rational basis test. That standard uniformly is applied in cases such as this one involving attacks on social or economic legislation. *See*, e.g., *Cleburne*, 473 U.S. at 440, 105 S.Ct. at 3254; *U.S. RR Retirement Bd. v. Fritz*, 449 U.S. 166, 174-77, 101 S.Ct. 453, 459-61, 66 L.Ed.2d 368 (1980), *reh'g denied* 450 U.S. 960, 101 S.Ct. 1421, 67 L.Ed.2d 385 (1981); *Vaden v. Village of Maywood*, 809 F.2d 361, 365 (7th Cir.1987). A higher level of scrutiny occurs only upon the implication of a fundamental right or the use of a suspect classification. *Fritz*, 449 U.S. at 174, 101 S.Ct. at 459; *Cleburne*, 473 U.S. at 440, 105 S.Ct. at 3254. Real estate agents are not a suspect class nor does the classification challenged here offend any recognized fundamental right.

8. Under the rational basis test, "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Cleburne*, 473 U.S. at 440, 105 S.Ct. at 3254. In applying this standard the court considers neither the improvidence of the legislation nor whether its goals could be accomplished more effectively. *Id.*; *Vaden*, 809 F.2d at 365. Rather, in the inquiry simply is "whether the ordinance is wholly arbitrary." *Vaden*, 809 F.2d at 365; *see*, also, Fritz, 449 U.S. at 177, 101 S.Ct. at 460.

9. Applying the rational basis standard here, the fact that the municipal counterdefendants permit special outreach efforts by local governments and non-profit fair housing centers does not offend counterplaintiffs' right to equal protection. Counterdefendants' interest in permitting such efforts—the promotion of diverse integrated communities—is, of course, legitimate. *See, Trafficante*, 409 U.S. 205, 93 S.Ct. 364; *Gladstone*, 441 U.S. 91, 99 S.Ct. 1601; *Barrick*, 491 F.2d 161. Specifically, authorizing outreach efforts by towns or fair housing centers is rationally related to that interest. This conclusion is buttressed by the State of Illinois' specific authorization of such efforts by local governments. Ill.Rev.Stat., ch. 68, ¶ 7-108(D); ch. 24, ¶ 11-11.1-1 (1985). Indeed, given the reality of the dual housing market, diverse integration may not be possible absent such outreach efforts. At a bare minimum it cannot be the case that such efforts either are patently arbitrary or an irrational means of accomplishing the stated interest. No greater showing is required here to defeat counterplaintiffs' equal protection claim. *Vaden*, 809 F.2d at 365.

10. Nor is the equal protection clause offended by the fact that the Model Ordinance communities prohibit panic peddling for profit and prohibit steering by providers of

real estate agent services. Just as Congress in the Fair Housing Act prohibited "for-profit" panic peddling, the municipalities may make the rational determination that panic peddling for profit is most destructive of residential integration. The rational basis for applying the prohibition of steering to real estate providers is equally clear: real estate agents by the intrinsic nature of their business are in daily contact with homesellers and homeseekers. It is surely rational to aim the prohibition on steering at those whose economic and professional positions place them in such direct and frequent contact with those who are subject to steering.

CONCLUSIONS

1. The court finds in favor of the counterdefendants and against the counterplaintiffs on Counts I, II, V and VI.

2. The court finds in favor of counterplaintiffs and against counterdefendant Hazel Crest on Count III and declares the provisions of Ordinance No. 9-1983, Divn. 6, § 14-34, unconstitutional and null and void.

3. The court finds in favor of all other counterdefendants and against counterplaintiffs on Count III.

4. The court finds in favor of counterplaintiffs and against counterdefendants on Count IV and declares the anti-solicitation ordinances of counterdefendants unconstitutional insofar as they prohibit forms of communications from realtors to signators of the municipal anti-solicitation lists other than solicitations actually seeking to induce the sale, rental or listing of dwellings.

IT IS SO ORDERED.

ON MOTION TO ALTER OR AMEND

I. Post-Trial Motion of Plaintiff South Suburban Housing Center

Plaintiff, South Suburban Housing Center ("SSHC"), has moved under Fed.R.Civ.P. 59(e) to alter or amend the court's December 19, 1988 Findings of Fact and Conclusions of Law. It is the expressed intent of SSHC that the court make only changes of a clarifying nature, to correct typographical errors, or to amplify on certain findings and not to seek to have the court alter its ultimate Findings of Fact and Conclusions of Law. Defendants, Greater South Suburban Board of Realtors ("GSSBR") and National Association of Realtors ("NAR"), object to all changes either as unnecessary or as being changes of substance. After reviewing the requests the court declines to make the changes proposed in paragraphs 1, 2, 5, 6, 7 and 8 of SSHC's motion but has changed and substituted Finding of Fact No. 11.

II. Municipalities' Motion

The municipal counterdefendants move the court pursuant to Rule 59(e) of the Fed.R.Civ.P. to amend its judgment and certain of its Findings of Fact and Conclusions of Law only relative to the First Amendment challenge to the municipal counterdefendants' solicitation ordinance (counterclaim, Ct. IV).

Basically the municipalities contend that the court's finding that the solicitation ordinances were unconstitutional because as more extensive than necessary to advance their purposes and were unconstitutionally vague, should be reconsidered in light of the Supreme Court decision of *Rowan v. U.S. Post Office*, 397 U.S. 728, 90 S.Ct. 1484,

25 L.Ed.2d 736 (1970), and the Seventh Circuit decision of *Curtis v. Thompson*, 840 F.2d 1291 (7th Cir.1988).

In *Rowan* the Supreme Court specifically upheld the constitutionality of a federal statute that empowered the post office upon the request of an individual to require that a sender of unsolicited mail remove the name and address of the individual from its mail lists. The *Rowan* case was cited as controlling by the lead opinion in *Curtis*, which upheld the Illinois statute making it a crime to solicit the sale of residential real estate once the owner has given notice that he does not desire to sell (Ill.Rev. Stat., ch. 38, § 70-51(d)). However, both the concurring opinion and the dissenting opinion in *Curtis* distinguished *Rowan* as not being controlling authority (although the concurring opinion felt that *Rowan* was "helpful.")

The court does not find *Rowan* or *Curtis* as authority for the municipalities' position. *Rowan* upheld a statute that permitted a resident to insulate himself from a particular mailer without regard to the content of the mailing. Here, in contrast, the ordinances exclude an entire class of mailers based upon occupation and content. In *Curtis* the plaintiff sought a preliminary injunction barring enforcement of the Illinois Anti-Solicitation Law. The trial court denied the preliminary injunction without holding an evidentiary hearing on the ground that the plaintiff had failed to demonstrate the likelihood of success on the merit. The plaintiff in *Curtis* sought what she claimed was "her First Amendment right to contact homeowners for the purpose of persuading them to sell or list their homes." *Id.*, p. 1297. The court did apply *Central Hudson Gas v. Public Service Com'n of N.Y.*, analysis, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980) which resulted in an extremely narrow holding: "Once actual notice is received by a real estate agent, that agent is barred

from contacting the homeowner *for the purpose of persuading him or her to list the residence for sale.*" *Id.*, p. 1304 (emphasis supplied). The Seventh Circuit therefore was not faced with an anti-solicitation ordinance that barred virtually all forms of communication from all realtors to homeowners. Here the court did no more than the majority approval in *Curtis*: a declaration that municipalities had power to prohibit solicitations to sell.

The court therefore denies the motion of the municipalities.

III. GSSBR and NAR Post-Trial Motion

Defendants/counterplaintiffs, GSSBR and NAR (collectively "NAR"), move to amend the judgment pursuant to Rule 59(e) of the Fed.R.Civ.P. and to amend the Findings of Fact and Conclusions of Law pursuant to Rules 59(a) and 60(a) and to amend their second amended complaint, Count VI, to conform to the proof at trial.

A.

The court's judgment of December 19, 1988 inadvertently omitted any rulings on Counts I, II and III of the complaint of plaintiff, SSHC. As pointed out by NAR, the court addressed each of SSHC's counts in the opinion and dismissed the counts in the body of the opinion (p. 1081). Accordingly, the court's judgment is entered in favor of defendants, GSSBR and NAR, and against plaintiff, SSHC, on Counts I, II and III of SSHC's complaint.

B. *Count VI*

NAR points out that the steering ordinances addressed by the court in its opinion at pages 1099-1101 were not

the ones in effect at the time of the trial. These ordinances were however the ones challenged in NAR's second amended counterclaim at paragraphs 78-83. The second amended counterclaim was the pleading at issue at the time the parties went to trial. Fed.R.Civ.P. 15(b) permits post-judgment amendments on the pleadings to conform to the evidence only when the "issues not raised by the pleadings are tried by express or applied consent of the parties." The record of this case is devoid of any evidence of express or applied consent of the municipality. In fact the municipalities filed their proposed Findings of Fact and Conclusions of Law regarding Count VI in conformance with the issues raised by the second amended counterclaim.

In any event the Fair Housing Ordinances which were in effect at the time of the trial are clearly not preempted by the Fair Housing Act. 42 U.S.C.A. § 3615 only invalidates ordinances that purport to require or permit actions that would be a discriminatory housing practice under the Fair Housing Act. None of the ordinances challenged (MX2, MX104, MX277 and MX382) violate the Fair Housing law. The gravamen of defendants' argument is that affirmative marketing, described by NAR as "benign steering", permitted by the Fair Housing Ordinances is a violation of 42 U.S.C. § 3604(e). However the court in its Findings of Fact and Conclusions of Law concerning the Fair Housing Act claims against affirmative marketing (Counts I and II, *see* pp. 1086-88) found no Fair Housing Act violation involved in that type of conduct. Accordingly, the court denies NAR's motion to file the amendment to its second amended complaint to vacate its Findings of Fact and Conclusions of Law on Count VI.

Count III of the Second
Amended Counterclaim

NAR moves the court to set aside its Findings of Fact and Conclusions of Law on the Village of Country Club Hills' sign permit and fee ordinance. NAR argues that the Country Club Hills' sign ordinance is specifically limited to real estate "for sale" signs, is not content neutral, and therefore the court time, place, or manner analysis is incorrect.

However the evidence submitted showed that Country Club Hills charged a fee and required an application for a permit for other commercial signs in residential areas (Country Club Hills Code, Art. 11, § 15.11.08(1), MX598 and MX599). There was no evidence that the fees charged exceeded the administration costs. Accordingly, the motion of NAR to vacate the judgment in favor of the municipalities on Count III of the second amended counterclaim is denied.

At the suggestion of the realtor the court has looked at Finding No. 9 on page 1080 of the court's December 19, 1988 opinion. It was the intent of the Finding of Fact that the relief sought, being the forced inclusion of listing agreements into defendant's MLS, would affirmatively further fair housing activity although the court did not feel that this was a severe intrusion into defendants' rights. Accordingly, the factor was not determinative. *Arlington Heights*, at 1295.

IT IS SO ORDERED.

[Docketed July 24, 1989]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SOUTH SUBURBAN HOUSING CENTER,

Plaintiff,

v.

GREATER SOUTH SUBURBAN BOARD OF REALTORS®, et al.,

Defendants.

No. 83 C 8149 — Hon. Harry D. Leinenweber

AMENDED JUDGMENT

This action having come to trial before the Court, the issues having been tried and the Court's decision rendered, IT IS ORDERED AND ADJUDGED

That the Court's Judgment of April 27, 1989 be and is amended *nunc pro tunc* to read, as amended:

> Judgment is entered in favor of defendants Greater South Suburban Board of Realtors® and National Association of Realtors® and against plaintiff South Suburban Housing Center on Counts I, II, III, IV and V of the Complaint.
>
> Judgment is entered in favor of the counterdefendants and against the counterplaintiffs on Counts I, II, V and VI of the counterclaim. Judgment is entered in favor of counterplaintiffs and against counterdefendant Village of Hazel Crest with respect to counterplaintiffs' constitutional claims contained in Count III of the counterclaim and the court declares

the provisions of Ordinance No. 9-1983, Divn. 6, section 14-34, unconstitutional and null and void. Judgment is entered in favor of counterdefendants City of Country Club Hills, Village of Glenwood, Village of Hazel Crest, Village of Matteson, Village of Park Forest and Village of University Park and against counterplaintiffs with respect to all other claims contained in Count III. Judgment is entered in favor of counterdefendants and against counterplaintiffs with respect to the Fair Housing Act claims contained in Count IV of the counterclaim. With respect to the constitutional claim contained in Count IV, judgment is entered in favor of counterplaintiffs and against counterdefendants as follows: the court declares the provisions of Ch. 19, Art. 2, Sec. 19.2.01(L) and Ch. 19, Art. 5, Secs. 19.6.01 and 19.6.02 of the Country Club Hills City Code; Ch. 28, Art. IV, Sec. 28-21 of the Village Code of Glenwood; Ch. 14, Art. III, Divn. 1, Sec. 14-27(M) and Divn. 4, Sec. 14-32 of the Village Code of Hazel Crest; Ch. 32, Art. IV, Sec. 32.100 of the Village Code of Matteson; Ch. 24½, Art. I, Sec. 24½-1 and Art. II, Secs. 24½-2, 24½-3 of the Village Code of Park Forest unconstitutional insofar as they prohibit forms of communications from realtors to signators of the municipal anti-solicitation lists other than solicitations actually seeking to induce the sale, rental or listing of dwellings.

/s/ H.D. LEINENWEBER

Date: July 21, 1989
nunc pro tunc 4/27/89

ORDINANCES INVOLVED

University Park

University Park's Real Estate Sign Ordinance (Section 1272.07(a)(2)) provides:

Except for the sale of unimproved parcels of land of five acres or more, no real estate sign shall be erected, exhibited, displayed or maintained outdoors in a residential district; however, a real estate sign, including a for sale sign, may be placed in a window of a residential dwelling.

Country Club Hills

Country Club Hills' Real Estate Sign Ordinance (Section 15.11.11 "Real Estate Signs") provides:

Signs that have for their purpose or intent the selling or renting of real estate located in residential zoning district, such as, but not limited to signs that contain words "for sale", "for rent", or any similar language shall conform with the following provisions:

A. No more than one real estate sign shall be erected on any premises.

B. No real estate sign shall exceed three square feet in area and the top surface shall not exceed three feet above existing grade at the point of erection.

C. Real estate signs shall be erected parallel to the front side of any building and shall be placed no more than 3 feet from the front foundation wall.

D. Prior to erection of any real estate sign, the owner of any property within the city or his agent shall file an application in accordance with the provisions of Chapter 14 of this Code.

E. No real estate sign shall contain the words "sold", "leased", or any similar language.

F. No real estate signs shall be an illuminated sign.

Matteson

Matteson's Real Estate Sign Ordinance (Section 159.55.11) provides:

(11) *Residential For Sale or For Rent Signs.* Residential For Sale or For Rent signs are exempted to the extent that they conform to the following regulations:

(a) *Illumination.* Such signs shall not be illuminated.

(b) *Size.* No such sign shall exceed 8 square feet (0.74 square meters) in area.

(c) *Location.* All signs shall be located on the lot that they are advertising. No such sign shall be placed more than 15 feet (3.05 meters) from the building line.

(d) *Height.* No such sign or supporting structure shall project higher than 5 feet (1.53 meters) above ground level at that point where it is located.

(e) *Number.* There shall not be more than 1 sign per lot.

Park Forest

Park Forest's Real Estate Sign Ordinance (Section 31-147 "Exempt Signs") permits only:

One non-illuminated "for sale" or "for rent" sign, per parcel of real estate, provided that the sign be placed on such parcel being offered for sale or rent. In residential districts, the sign area may not exceed five (5) square feet. In commercial and industrial districts, the maximum sign area may not exceed twenty (20) square feet, and advertise exclusively the sale of the land or building upon which the sign is displayed, provided:

(1) Such sign states the date on which said sign was erected;

(2) No "sold" sign may be erected unless it replaces a previously existing "for sale" sign; and

(3) "Sold" signs shall be removed upon closing of a sale.

Park Forest

Sec. 24½-2. Solicitation.

(a) It shall be an unfair real estate practice for any real estate agent, broker or salesperson to engage in solicitation without first having:

(1) Met with the village manager (or his designated representative) to discuss briefly the solicitation and its compliance with this chapter, such meeting to occur no more than three (3) business days after requested unless the requesting person agrees to a later date.

(2) Provided to the village manager one copy of each brochure, letter, or other written or printed material to be shown, given or sent to any person solicited; and

(3) Submitted to the village manager on a form provided by the village the following information:

a. The name, address, telephone number and real estate license number of each person who will be participating in the solicitation;

b. The general location to be solicited;

c. The time interval of solicitation;

d. The means of solicitation, e.g., written material by mail, written material left at door, telephone, personal visit to home.

(b) In the event there is any change in the information submitted to the village manager pursuant to (a) above notification of such change must be submitted to the village manager within thirty (30) days of its occurrence.

(c) The village manager may at any time, but in any event no more frequently than six (6) months, request verification of any information provided pursuant to (a) above, such verification to be provided within thirty (30) days of such request. (Ord. No. 1322, § 2, 11-25-85)

Sec. 24½-3. Request for nonsolicitation.

(a) No real estate agent, broker or salesperson shall solicit any owner or occupant of a dwelling to sell or rent, or list for sale or rental, such dwelling at any time after such owner or occupant has notified the village clerk that he/she does not desire to be so solicited. Such notification shall remain in effect until such time as said owner or occupant instructs the village clerk otherwise, or the property owned by such person is advertised for sale or rent by use of a sign or any other form written publication.

(b) The village clerk shall publish and make available, without charge, appropriate forms which may be executed by any owner or occupant of a dwelling to provide such notice. The clerk shall prepare a list of the names and addresses of such owners and occupants and shall update such list no less than annually during the month of January and shall publish the same as follows:

(1) By maintaining a copy of said list in the office of the village clerk and making it available for inspection.

(2) By furnishing a copy of said list annually to every real estate firm belonging to the local multiple-listing service.

(3) By furnishing a copy of said list upon request and payment of reproduction costs to any person having an interest in the sale or rental of any dwelling in the village. (Ord. No. 1322, § 2, 11-25-85)

Country Club Hills

19.6.01. SOLICITATION.

No person shall solicit any owner or occupant of a dwelling to sell or rent, or list for sale or rental, such dwelling at any time after such owner or occupant has notified the City Clerk of Country Club Hills that he does not desire to be so solicited.

The City Clerk shall publish and make available, without charge, appropriate forms which may be executed by any owner or occupant of a dwelling to provide such notice. The City Clerk shall prepare a list of names and addresses of such owners and occupants both alphabetically and by street address and shall publish the same as follows:

A. By maintaining a copy of said list in the office of the City Clerk of the City of Country Club Hills and making it available for inspection;

B. By furnishing a copy of said list annually to every real estate agent belonging to the local multiple-listing service, and by posting quarterly the additions and deletions to the list at the City Hall; and,

C. By furnishing a copy of said list upon request and payment of reproduction costs to any person having an interest in the sale or rental of any dwelling in Country Club Hills.

19.6.02: Any owner or occupant of a dwelling may notify, in writing, any real estate agent that such owner or occupant does not desire to be solicited. Upon such notice, a real estate agent shall not solicit such owner or occupant to sell or rent, or list for sale or rental, such dwelling.

The Country Club Hills Ordinance was amended as follows:

Section 19.2.01. DEFINITIONS.

L. "Solicit" or "solicitation" means any communication by or on behalf of a real estate agent with the owner or occupant of a dwelling (i) which is intended to induce the sale, rental or listing for sale or rental of such dwelling; (ii) which is intended to offer or promote services in connection with the sale, rental or listing of such dwelling; and (iii) which is carried out by means of:

(a) in-person contacts at the dwelling;

(b) written material mailed or delivered directly to the dwelling, such as direct mail, leaflets or pamphlets; or

(c) telephonic contacts with owners or occupants of the dwelling.

For purposes of this Ordinance the term "solicit" or "solicitation" shall not refer to communication carried out by means of print or electronic media of general circulation, such as a newspaper, radio, television or the yellow pages.

Matteson

Section 32.100. Solicitation.

No real estate agent shall solicit any owner or occupant of a dwelling to sell or rent, or list for sale or rental, such dwelling at any time after such owner or occupant has notified the Village of Matteson Clerk that he does not desire to be so solicited.

The Clerk shall publish and make available, without charge, appropriate forms which may be executed by any owner or occupant of a dwelling to provide such notice. The Clerk shall prepare a list of the names and addresses of such owners and occupants and shall publish the same as follows:

A) By maintaining a copy of said list in the office of the Village of Matteson Clerk and making it available for inspection;

B) By mailing or otherwise delivering a copy of said list annually to every real estate firm belonging to the local board of realtors; and

C) By furnishing a copy of said list upon request and payment of reproduction costs to any person having an interest in the sale or rental of any dwelling in Matteson.

In addition, any owner or occupant of a dwelling may notify, in writing, any real estate agent that such owner or occupant does not desire to be solicited. Upon such notice, a real estate agent shall not solicit such owner or occupant to sell or rent, or list for sale or rental, such dwelling.

"Solicit" or "solicitation" means any communication by or on behalf of a real estate agent with the owner or occupant of a dwelling (i) which is intended to induce the sale, rental or listing of such dwelling, (ii) which is intended to offer or promote services in connection therewith, and (iii) which is carried out by means of any of the following:

(a) in-person contacts at the dwelling;

(b) written material mailed or delivered directly to the dwelling such as direct mail, leaflets or pamphlets; and

(c) telephonic contacts with the owner or occupant of the dwelling.

For purposes of this ordinance the term "solicit" or "solicitation" shall not refer to communication carried out by means of print or electronic media of general circulation such as newspapers, radio, television or the yellow pages.

"Real estate agent" means any person who for consideration negotiates or attempts to negotiate the purchase, sale, rental or listing of a dwelling or interest therein, including, but not limited to, all persons licensed or required to be licensed pursuant to the provisions of the Illinois Real Estate License Act, *Ill.Rev.Stat.*, Ch. 111, ¶ 5801 *et seq.*

Hazel Crest

DIVISION 4; SOLICITATION

Section 14-32. Solicitation.

No person shall solicit any owner or occupant of a dwelling to sell or rent, or list for sale or rental, such dwelling at any time after such owner or occupant has notified the Hazel Crest Village Clerk that he does not desire to be so solicited.

The Clerk shall publish and make available, without charge, appropriate forms which may be executed by any owner or occupant of a dwelling to provide such notice. The Clerk shall prepare a list of the names and addresses of such owners and occupants and shall publish the same as follows:

A. By maintaining a copy of said list in the office of the Village of Hazel Crest Clerk and making it available for inspection;

B. By furnishing a copy of said list annually to every real estate firm belonging to the local multiple-listing service;

C. By furnishing a copy of said list upon request and payment of reproduction costs to any person having an interest in the sale or rental of any dwelling in the Village of Hazel Crest.

In addition, any owner or occupant of a dwelling may notify, in writing, any real estate agent that such owner or occupant does not desire to be solicited. Upon such notice, a real estate agent shall not solicit such owner or occupant to sell or rent, or list for sale or rental, such dwelling.

Section 14-27 of the Hazel Crest Ordinance was amended as follows:

"Solicit" or "solicitation" means any communication by or on behalf of a real estate agent with the owner or occupant of a dwelling (i) which is intended to induce the

sale, rental or listing for sale or rental of such dwelling; (ii) which is intended to offer or promote services in connection with the sale, rental or listing of such dwelling; and (iii) which is carried out by means of:

(a) in-person contacts at the dwelling;

(b) written material mailed or delivered directly to the dwelling, such as direct mail, leaflets or pamphlets; or

(c) telephonic contacts with owners or occupants of the dwelling.

For purposes of this Ordinance the term "solicit" or "solicitation" shall not refer to communication carried out by means of print or electronic media of general circulation, such as a newspaper, radio, television or the yellow pages.

Glenwood

ARTICLE IV; SOLICITATION

Section 28-21. Solicitation.

No real estate agent shall solicit any owner or occupant of a dwelling to sell or rent, or list for sale or rental, such dwelling at any time after such owner or occupant has notified the Village Clerk that he does not desire to be so solicited.

The Clerk shall publish and make available, without charge, appropriate forms which may be executed by any owner or occupant of a dwelling to provide such notice. The Clerk shall prepare a list of the names and addresses of such owners and occupants shall publish the same as follows:

A) By maintaining a copy of said list in the office of the Village Clerk and making it available for inspection;

B) By mailing or otherwise delivering a copy of said list annually, plus a quarterly list of additions and deletions, to every real estate firm belonging to local mutliple-listing service; and

C) By furnishing a copy of said list upon request and payment of reproduction costs to any person having an interest in the sale or rental of any dwelling in the Village.

In addition, any owner or occupant of a dwelling may notify in writing, any real estate agent that such owner or occupant does not desire to be solicited. Upon such notice, a real estate agent shall not solicit such owner or occupant to sell or rent, or list for sale or rental, such dwelling.

"Solicit" or "solicitation" means any communication by or on behalf of a real estate agent with the owner or occupant of a dwelling (i) which is intended to induce the sale, rental or listing of such dwelling, (ii) which is intended to offer or promote services in connection therewith, and (iii) which is carried out by means of any of the following:

(a) in-person contacts at the dwelling;

(b) written material mailed or delivered directly to the dwelling such as direct mail, leaflets or pamphlets; and

(c) telephonic contact with the owner or occupant of the dwelling.

For purposes of this ordinance the term "solicit" or "solicitation" shall not refer to communication carried out by means or print or electronic media of general circulation such as newspapers, radio, television or the yellow pages.

"Real estate agent" means any person who for consideration negotiates or attempts to negotiate the purchase, sale, rental, or listing of a dwelling or interest therein, including, but not limited to, all persons licensed or required to be licensed pursuant to the provisions of the Illinois Real Estate Brokers and Salesmen Act, *Ill.Rev. Stat.*, Ch. 111, Sec. 5701 *et seq.*